Supreme Court, U.S.
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95-839 NOV 28 1995

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No. _________

In The

Supreme Court of the United States

October Term, 1995

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JOHN R. LINDSAY, LINDSAY ENTERPRISES, INC.,
a California corporation, INVESTMENT MANAGEMENT
ASSOCIATES 79-6, a limited partnership,
INVESTMENT MANAGEMENT ASSOCIATES 81-3,
a limited partnership and PAUL BUSHARD, et al.,

Petitioners,

v.

BENEFICIAL REINSURANCE COMPANY,
a corporation and BENEFICIAL STANDARD
LIFE INSURANCE COMPANY, a corporation,

Respondents.

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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149 pp

QUESTIONS PRESENTED

1. Does due process entitle "known or reasonably ascertainable creditors" to actual notice of a foreclosure sale in accordance with *Tulsa Professional Collection Services v. Pope,* 485 U.S 478, 108 S.Ct. 1340 (1988)?

2. Does the decision of this Court in *BFP v. Resolution Trust Corp.,* 114 S. Ct. 1757 (1994) overruling § 548 of the Bankruptcy Code where the judgment affects title to land extend also to overrule an award of money damages which has no impact on title to land?

3. Does language in an order not otherwise final which does not meet the requirements of F.R. Civ. P. 54(b) nonetheless start the time running for filing a notice of appeal, or as the Second Circuit held in *Ansam Associates, Inc v. Cola Petroleum, Ltd.,* 760 F. 2d 442 (2d Cir. 1985) does the time for filing a notice of appeal not commence to run until final judgment?

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The parties to the proceeding below were:

Petitioners:

JOHN R. LINDSAY and LINDSAY ENTERPRISES, INC., who are reorganized debtors under a confirmed Chapter 11 bankruptcy reorganization plan;

INVESTMENT MANAGEMENT ASSOCIATES 79-6 and INVESTMENT MANAGEMENT ASSOCIATES 81-3, which are limited partnerships wholly owned by the reorganized debtors; and

PAUL BUSHARD and 42 other individual creditors who comprise Class 4A in said Chapter 11 bankruptcy reorganization plan.

Petitioners are collectively referred to herein as the "Lindsay Entities."

Respondents:

BENEFICIAL REINSURANCE COMPANY, INC. and BENEFICIAL STANDARD LIFE INSURANCE COMPANY, INC. They are collectively referred to herein as "Beneficial."

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS ii

OPINIONS BELOW 1

JURISDICTION 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 7

1. DUE PROCESS REQUIRES THAT "KNOWN OR REASONABLY ASCERTAINABLE CREDITORS" BE GIVEN ACTUAL NOTICE OF A FORECLOSURE SALE 8

2. REVIEW SHOULD ALSO BE GRANTED BECAUSE THE NINTH CIRCUIT INTERPRETED *BFP* TO EXTEND TO OVERRULE AN AWARD OF MONEY DAMAGES UNDER § 548, BUT MONEY DAMAGES HAVE NO IMPACT ON "THE SECURITY AND STABILITY OF TITLE TO LAND." 13

3. F.R. CIV. P. 54(b) CERTIFICATION NOT BEING SUFFICIENT, THE TIME FOR FILING NOTICE OF APPEAL ALSO DOES NOT COMMENCE TO RUN UNTIL FINAL JUDGMENT. THIS DECISION IS IN CONFLICT WITH THE DECISION OF ANOTHER UNITED STATES COURT OF APPEALS ON THIS IMPORTANT MATTER 19

CONCLUSION 22

APPENDIX ....App. 1

TABLE OF AUTHORITIES

Page

CASES

Adams v. Dept. of Motor Vehicles, 11 Cal.3d 146, 113 Cal. Rptr. 145 (1974) 11

Alaska Airlines v. Brock, 480 U.S. 678, 107 S.Ct. 1476 (1987) 14

Allis-Chalmers Corp. v. Philadelphia Electric Co., 521 F.2d 360 (3rd Cir. 1975) 20, 21

American Land Co. v. Zeiss, 219 U.S. 47, 31 S.Ct. 200 (1911) 11, 12, 13

Ansam Assoc., Inc. v. Cola Petroleum, Ltd., 760 F.2d 442 (2nd Cir. 1985) .... i, 19, 20, 22, 23

Ballentyne v. Smith, 205 U.S. 285, 27 S.Ct. 527 (1907) 15, 16

Bank of Seoul and Trust Co. v. Marcione, 198 Cal.App.3d 113, 244 Cal.Rptr. 1 (1988) 17

BFP v. Resolution Trust Corporation, 114 S.Ct. 1757 (1994) .... i, 7, 8, 13, 14, 18, 19, 23

Campbell v. Westmoreland Farm Inc., 403 F.2d 939 (2d Cir. 1968) 20

Charter National Bank – Houston v. Stevens, 781 S.W.2d 368 (Tex. App. Houston 1989) 17

Donel Inc. v. Badalian, 87 Cal.App.3d 327, 150 Cal. Rptr. 855 (1978) 11

Ford & Vlahos v. ITT Commercial Finance Corp., 8 Cal.4th 1220, 36 Cal.Rptr.2d 464 (1994) 18

Gelfert v. National City Bank of New York, 313 U.S. 221, 61 S.Ct. 898 (1941) 14-15

Graffam v. Burgess, 117 U.S. 180, 6 S.Ct. 686 (1886) 16

TABLE OF AUTHORITIES – Continued

Page

Greene v. Lindsey, 456 U.S. 444, 102 S.Ct. 1874 (1982) 9

In re Cummings, 173 Bkcy. Rptr. 959 (Bkcy. N.D. Ga. 1994). 18

In re Worcester, 811 F.2d 1224 (9th Cir. 1987). 17

Jasper Federal Savings and Loan Association v. Reddell, 730 S.W.2d 672 (Tex. 1987) 18

Jinkins v. Chambers, 622 S.W.2d 614 (Tex. App. Tyler 1981) 17

Johnson v. Alma Inv. Co., 47 Cal.App.3d 155, 120 Cal. Rptr. 503 (1975). 11

Knafel v. Pepsi Cola Bottlers of Akron, Inc., 850 F.2d 1155 (6th Cir. 1988). 21

Lindsay v. Beneficial Reinsurance Company, 59 F.3d 942 (9th Cir. 1995). 1, 3, 22

Lindsay v. Beneficial Reinsurance Company, 98 Bkcy. Rptr. 983 (Bkcy. S.D. Cal. 1989) 1

Mennonite Board of Missions v. Adams, 462 U.S. 791, 103 S.Ct. 2706 (1983) 9, 10

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652 (1950) 9, 10, 11

New Destiny Dev. Corp. v. Piccione, 802 F. Supp. 692 (D. Conn. 1992) 11

Newman v. Jackson, 25 U.S. [12 Wheat] 570 (1827) 18

Panichella v. Pennsylvania Railroad, 252 F.2d 452 (3rd Cir. 1958). 21

Parks v. "Mr. Ford", 556 F.2d 132 (3rd Cir 1977) 11

TABLE OF AUTHORITIES – Continued

Page

Rael v. Taylor, 876 P.2d 1210 (Colo. 1994) 11

Santa Maria v. Owens-Illinois, Inc., 808 F.2d 848 (1st Cir. 1986) 20, 21

Tulsa Professional Collection Services v. Pope, 485 U.S. 478, 108 S.Ct. 1340 (1988) . . . . . .i, 7, 9, 10, 12, 23

University Savings Association v. Springwoods Shopping Center, 644 S.W.2d 705 (Tex. 1982). 17-18

Zipperer v. City of Fort Myers, 41 F.3d 619 (11th Cir. 1995) 9-10

STATUTES

11 U.S.C. §548 . . . . i, 4, 5, 7, 8, 13, 14, 18, 23

Federal Rule of Civil Procedure 54(b) . . . . .i, 6, 8, 19, 20, 21, 22, 23

Bankruptcy Rule 7054(a) 6

California Civil Code §22.2 17

Vernon's Texas Codes Annotated, 1 Civil Practice and Remedies Code §5.001 17

MISCELLANEOUS

4 *Casner, American Law of Property* (1952) Mortgages, Section 16.207 18

Uniform Land Security Interest Act 18

PETITION FOR WRIT OF CERTIORARI

Petitioners JOHN R. LINDSAY and LINDSAY ENTERPRISES, INC. as reorganized debtors, INVESTMENT MANAGEMENT ASSOCIATES 79-6, INVESTMENT MANAGEMENT ASSOCIATES 81-3 and PAUL BUSHARD and the 42 other individual creditors who comprise Class 4A in said plan respectfully request this Court to issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit entered herein on July 12, 1995.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in *Lindsay v. Beneficial Reinsurance Company*, 59 F.3d 942 (9th Cir. 1995) is reproduced in the Appendix (hereafter "App.") at App. 1 and the order of the Ninth Circuit denying the petition for rehearing and rejecting the suggestion for rehearing en banc is produced at App. 25. The opinion of the United States District Court for the Southern District of California is reproduced at App. 29 and a prior order of the District Court is reproduced at App.76. The opinion of the United States Bankruptcy Court for the Southern District of California, 98 Bkcy. Rptr. 983 (Bkcy. S.D. Cal. 1989) is reproduced at App. 86 and the judgment of the Bankruptcy Court is reproduced at App. 117.

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JURISDICTION

On July 12, 1995, the United States Court of Appeals for the Ninth Circuit filed its opinion in this matter. Petitioners timely filed their petition for rehearing with suggestion for rehearing en banc. The Court of Appeals denied their petition on August 31, 1995 (App. 25).

This petition for certiorari was filed within 90 days of said denial. This Court has jurisdiction to review the judgment or decree of a federal court of appeals by way of writ of certiorari under 28 U.S.C. § 1254(1).

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STATEMENT OF THE CASE

Petitioners the Lindsay Entities originally owned a parcel of real property (the "Subject Property") located in Austin, Texas. Respondent Beneficial made a loan to the Lindsay Entities secured by a first deed of trust encumbering the Subject Property. Mr. Lindsay personally guaranteed that loan.

The Subject Property was sold by the Lindsay Entities to a third party, subject to the Beneficial deed of trust and the Lindsay Entities carried back a junior deed of trust encumbering the Subject Property. That third party then went into bankruptcy in Texas. Mr. Lindsay, Lindsay Enterprises, Inc. and two of Mr. Lindsay's other corporations then went into bankruptcy in California.

The Lindsay Entities and Beneficial each retained their own Texas attorneys to seek relief from the automatic stay of the Texas bankruptcy proceeding to foreclose on the Subject Property.

Beneficial obtained stay relief. The Texas attorneys for Beneficial had agreed to give notice to the Texas attorneys for the Lindsay Entities if and when they obtained such stay relief, but they did not give such (or any) notice to the Texas attorneys for the Lindsay Entities of their having obtained such stay relief.

The Texas attorneys for Beneficial also acted as trustee under Beneficial's deed of trust and commenced foreclosure on the Subject Property under Beneficial's deed of trust. The Lindsay Entities received no notice of this foreclosure.

The Texas attorneys for Beneficial sent notice of this foreclosure sale to Mr. Lindsay, the guarantor, and the other Lindsay Entities at an old address for Mr. Lindsay and these Lindsay Entities even though the Texas attorneys for Beneficial had the current address for Mr. Lindsay and other Lindsay entities in another one of their files.

As noted by the Court of Appeals:

> "Mr. Lindsay's address was used for all the debtors and he had moved." 59 F. 3d at 949.

The Texas attorneys for Beneficial had the current address for Mr. Lindsay and other Lindsay entities in this other file because Mr. Lindsay and these other Lindsay entities had previously had another loan from Beneficial. When Mr. Lindsay moved his office, Mr. Lindsay's staff gave notice of this change of address to Beneficial and Beneficial and its Texas attorneys apparently corrected the Lindsay address in the previous loan file but not in the file as to the loan which is the subject of the present suit.

The notices of this foreclosure sale were returned by the post office to the Texas attorneys for Beneficial. The Texas attorneys for Beneficial did not check their other file to find the current address for Mr. Lindsay and these other Lindsay Entities. The Texas attorneys for Beneficial also did not ask the Texas attorneys for the Lindsay Entities for the current address for the Lindsay Entities although the Texas attorneys for Beneficial and the Texas attorneys for the Lindsay Entities were in substantial communication during that time.

The Texas attorneys for Beneficial conducted their foreclosure sale of the Subject Property. No third party bidders came to the sale. Beneficial made a credit bid of $1,500,000 of the $1,664,392 then due on its first trust deed note. The value of the Subject Property at that time was $2,500,000.

In order to recover this excess value of the Subject Property of $2,500,000 less Beneficial's debt of $1,664,392, which was $835,608, the Lindsay Entities then put Investment Management Associates 79-6 and Investment Management Associates 81-3 into their own Chapter 11 cases in the United States Bankruptcy Court for the Southern District of California and filed this complaint in the Bankruptcy Court against Beneficial to recover this difference of $835,608 on several alternative counts.

The Bankruptcy Court after trial of the matter found that the Lindsay Entities were not entitled to actual notice of the foreclosure sale under Texas law, but also found that the amount bid by Beneficial was not reasonably equivalent value for the Subject Property under § 548 of the Bankruptcy Code and gave the Lindsay Entities judgment for the difference of $835,608 (App. 117).

Beneficial posted its appeal bond and the case was appealed to the United States District Court for the Southern District of California. The District Court essentially affirmed the Bankruptcy Court on the § 548 issue, which was the second claim in the complaint, but reversed the Bankruptcy Court on the notice or state law issue, which was the third claim in the complaint, and remanded the matter to the Bankruptcy Court for further findings.

The District Court also reversed the Bankruptcy Court on the summary judgment which the Bankruptcy Court had previously entered in favor of Beneficial on the first and fourth through seventh claims in the complaint and remanded those to the Bankruptcy Court for further proceedings. (Those pled violation of the automatic stay of the reorganized debtors' Chapter 11 cases in California, and that the breach by the Texas attorneys for Beneficial of their promise to give notice to the Texas attorneys for the Lindsay Entities was actionable on contract and misrepresentation grounds. All claims were alternative bases for the same relief.)

The summary judgment order entered by the Bankruptcy Court, which had been prepared by Beneficial, included conclusory language stating "There is no just reason for delaying entry of this judgment as to those causes of action for which summary judgment is granted, and judgment shall be so entered."

Beneficial had previously made a motion in the District Court to dismiss the appeal of the Lindsay Entities of the summary judgment order as not timely, which appeal was taken after entry of final judgment by the Bankruptcy Court. Beneficial argued that the conclusory language amounted to certification for immediate appeal under F.R. Civ. P. 54(b), and Bankruptcy Rule 7054(a), and that the time for filing notice of appeal started when that order was entered rather than after trial when final judgment was entered, although the Bankruptcy Court had not been asked to make such a certification and had not made the findings necessary to such a certification and did not intend to make such a certification.

The District Court denied that motion (App. 76) based, among others, on Second Circuit precedent holding that, without a sufficient F.R. Civ. P. 54(b) certification, the time for filing notice of appeal did not commence to run until entry of final judgment.

The case was then appealed to the United States Court of Appeals for the Ninth Circuit.

The Ninth Circuit overruled the District Court on the Rule 54(b) issue, holding that the summary judgment order had not been timely appealed and thus creating a conflict with a decision of the United States Court of Appeals for the Second Circuit holding that an improper Rule 54(b) certification does not start the time for appeal to run.[1]

The Ninth Circuit then reversed the District Court on the notice issue holding that Texas law did not require actual notice to Mr. Lindsay as guarantor and the other Lindsay Entities, even though they were "known or reasonably ascertainable creditors," to use the language of this Court in *Tulsa Professional Collection Services v. Pope.*

---

[1] We will brief the converse of that issue, which is whether this was a final order which was appealable after the insufficient Rule 54(b) certificiation, on the merits if review is granted.

The Ninth Circuit also reversed the District Court on the § 548 issue, interpreting the opinion of this Court in *BFP v. Resolution Trust Corp.* to extend also to overrule an award of money damages under § 548 even though money damages have no effect on title to land and having an effect on title to land was the reason this Court overruled § 548 in *BFP v. RTC.*

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REASONS FOR GRANTING THE PETITION

There are two important federal questions that this decision has decided in a way that each conflicts with relevant decisions of this Court.

1. The Court of Appeals for the Ninth Circuit disregarded due process as articulated by this Court in *Tulsa Collection* in holding that the Lindsay Entities and Mr. Lindsay as guarantor of the Beneficial obligation were not entitled to actual notice of Beneficial's foreclosure sale even though they were "known or reasonably ascertainable creditors."

2. The Court of Appeals interpreted the decision of this Court in *BFP v. RTC* as extending also to overrule this award of money damages under § 548 of the Bankruptcy Code which had no impact on any land title. It was only the paramount state interest in title to land which this

Court found sufficient to overrule the plain meaning of § 548 in *BFP v. RTC*.

This United States court of appeals has also entered this decision in conflict with the decision of the United States Court of Appeals for the Second Circuit on the same important matter: when time for filing a notice of appeal commences to run after an insufficient Rule 54(b) certification.

1. DUE PROCESS REQUIRES THAT "KNOWN OR REASONABLY ASCERTAINABLE CREDITORS" BE GIVEN ACTUAL NOTICE OF A FORECLOSURE SALE.

The Lindsay Entities were known to Beneficial. They were the original borrowers and guarantor of Beneficial's loan. Their Texas attorneys and Beneficial's Texas attorneys were in communication and litigation in the Texas bankruptcy court, and their Texas attorneys had sought and received the promise of Beneficial's Texas attorneys to give them notice of any stay relief which Beneficial's attorneys obtained from the Texas bankruptcy court to foreclose on the Subject Property.

Beneficial's Texas attorneys also had the current address for Mr. Lindsay and other Lindsay partnerships in their file for a prior Lindsay loan from Beneficial, and Mr. Lindsay was entitled to notice of this foreclosure on the Subject Property since he had guaranteed this loan.

In spite of all of this, Beneficial's attorneys as trustee under Beneficial's trust deed sent notice of this foreclosure sale on the Subject Property to the old address of

Mr. Lindsay and the Lindsay Entities. More remarkably, when these notices came back unclaimed, Beneficial's attorneys who by that time had already breached their promise to give notice of the stay relief order to the Texas attorneys for the Lindsay Entities did not give them notice of the foreclosure sale or even ask them for the current Lindsay address.

As a matter of due process, "known or reasonably ascertainable creditors" are entitled to actual notice. *Tulsa Professional Collection Services v. Pope,* 485 U.S. 478, 490, 108 S. Ct. 1340, 1347, (1988); *Mennonite Board of Missions v. Adams,* 462 U.S. 791, 103 S. Ct. 2706 (1983); *Greene v. Lindsey,* 456 U.S. 444, 102 S. Ct. 1874 (1982); *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 70 S. Ct. 652, (1950).

Tulsa Collection deals with the entitlement of unsecured creditors to notice, building on *Mullane* and *Mennonite.*

> "Appellant's interest [in *Tulsa Collection*] is an unsecured claim, a cause of action against the estate for an unpaid bill. Little doubt remains that such an intangible interest is property protected by the Fourteenth Amendment . . . this question 'was affirmatively settled by the *Mullane* case itself, where the Court held that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Cause.' " *Tulsa Collection,* 485 U.S. at 485, 107 S. Ct. at 1344-5.

A recent citation of that language applying it to secured creditors such as the Lindsay Entities is found in *Zipperer* *v. City of Fort Myers,* 41 F. 3d 619, 623 (11th Cir. 1995) where that court, after quoting the language, states:

> "Thus, as a mortgagee, Zipperer has a constitutionally protected property interest in his mortgage."

The Lindsay Entities as the reorganized debtors in the consolidated Lindsay Chapter 11 cases and the debtors in possession in the Chapter 11 cases of these two Investment Management Associates partnerships attempted to enforce this junior mortgage for the benefit of their myriad creditors.

Actual notice is compelled by *Mennonite*:

> "The tax sale immediately and drastically diminishes the value of this security interest. . . . Ultimately, the tax sale may result in the complete nullification of the mortgagee's interest. . . .
>
> Since a mortgagee clearly has a legally protected property interest, he is entitled to notice reasonably calculated to apprise him of a pending tax sale [citation]. . . .
>
> Neither notice by publication and posting, nor mailed notice to the property owner, are means 'such as one desirous of actually informing of the [mortgagee] might reasonably adopt to accomplish it.' *Mullane,* 339 U.S. at 315, 70 S.Ct. at 657 . . . " 462 U.S. at 798-9, 103 S.Ct. at 2711.

It was on that background that this Court held in *Tulsa Collection* that "actual notice to known or reasonably ascertainable creditors" was required. 485 U.S. at 490, 108 S.Ct. at 1347.

That has been the position of this Court, at least since *American Land Co. v. Zeiss*, 219 U.S. 47, 31 S.Ct. 200 (1911), which required the party seeking to quiet title to land to serve:

> " 'all whom, with reasonable diligence, he could ascertain to be claimants,' "

and to file his affidavit to that effect, 219 U.S. at 65, 31 S.Ct. at 206; *Rael v. Taylor*, 876 P.2d 1210, 1225-6 (Colo. 1994). It should be required in judicial foreclosure sales and in trustee's foreclosure sales, *New Destiny Dev. Corp. v. Piccione*, 802 F. Supp. 692 (D. Conn. 1992); *Parks v. "Mr. Ford"*, 556 F. 2d 132 (3rd Cir. 1977); *Adams v. Dept. of Motor Vehicles*, 11 Cal. 3d 146, 113 Cal. Rptr. 145 (1974); *Johnson v. Alma Inv. Co.*, 47 Cal. App. 3d 155, 120 Cal. Rptr. 503 (1975).

The Texas attorneys for Beneficial had the correct address for Mr. Lindsay in their files. They were in substantial communication with the Texas attorneys for the Lindsay Entities. All they had to do to give notice or get the current Lindsay address was to call and ask.

The case is remarkably similar to the case of *Donel Inc. v. Badalian*, 87 Cal. App. 3d 327, 150 Cal. Rptr. 855 (1978) where, as here, the attorneys for both parties had been in communication. The California court gave relief based on *Mullane* stating:

> "It seems logical to us that, if Donel truly desired to give Badalian notice . . . counsel would have at least advised attorney Caplow of his inability to serve Badalian and sought from him information as to Badalian's whereabouts . . . . " 87 Cal. App. 3d at 335, 150 Cal. Rptr. at 859.

That is the "reasonably diligent effort" required by this Court from *Zeiss*, 219 U.S. at 65, 31 S.Ct. at 206, through *Tulsa Collection*, 485 U.S. at 490, 108 S.Ct. at 1347.

As the Bankruptcy Court found, the Subject Property had a value of $2,500,000 and Beneficial was only owed $1,644,392 so there was value in the Subject Property in excess of Beneficial's debt of $835,608.

This excess value of $835,608 put Beneficial in a tremendous conflict of interest. It was to Beneficial's interest if the Lindsay Entities never got actual notice of Beneficial's foreclosure sale so, as happened, Beneficial could be paid in full and also keep this excess value of $835,608.

This Court in *Tulsa Collection* noted this conflict of interest stating under those facts that:

> "the executor or executrix will often be, as is the case here, a party with a beneficial interest in the estate. This could diminish an executor's or executrix's inclination to call attention to the potential expiration of a creditor's claim. There is thus a substantial practical need for actual notice in this setting." 485 U.S. at 489, 108 S.Ct. at 1347.

The Lindsay Enterprises as "known or reasonably ascertainable creditors" and parties in interest were entitled to actual notice of the foreclosure sale by due process. Because the Ninth Circuit has decided this important federal question in a way that conflicts with *Tulsa Collection* and other relevant decisions of this Court without considering the Constitutional requirements, review should be granted.

2. REVIEW SHOULD ALSO BE GRANTED BECAUSE THE NINTH CIRCUIT INTERPRETED *BFP* TO EXTEND TO OVERRULE AN AWARD OF MONEY DAMAGES UNDER § 548, BUT MONEY DAMAGES HAVE NO IMPACT ON "THE SECURITY AND STABILITY OF TITLE TO LAND."

BFP involved a foreclosure sale where the purchaser was not the foreclosing lender but instead was a third party purchaser, 114 S. Ct. at 1759, and thus the case would have had an impact on title to land. Here, however, there was no third party purchaser and title to land is not involved. The judgment of the Bankruptcy Court (App. 117) only awarded money damages against Beneficial.

Recall that this Court in *BFP* had no quarrel with § 548 of the Bankruptcy Code in general.

> "3. We emphasize that our opinion today covers only mortgage foreclosures of real estate. The considerations bearing upon other foreclosures and forced sales . . . may be different." 114 S. Ct. at 1761, n 3.

It was only because § 548 "impinged" on the "essential state interest . . . 'in the security of the titles to real estate,' " 114 S. Ct. at 1764, that this Court overruled § 548.

> "8. This ignores the fact that it is not state authority over *debtor-creditor* law in general that is at stake in this case but the essential sovereign interest in the security and stability of title to land. See *American Land Co. v. Zeiss*, 219 U.S. 47. . . . ", 114 S. Ct. at 1765, n 8.

The judgment in this case (App. 117) has no impact on "the security and stability of title to the land." Thus § 548 of the Bankruptcy Code should be left free to operate in this case as found by the Bankruptcy Court and District Court below.

> " '[A] court should refrain from invalidating more of the statute than is necessary. . . . ' " *Alaska Airlines v. Brock,* 480 U.S. 678, 684, 107 S.Ct. 1476, 1479 (1987).

This Court has previously noted that § 548(a)(2) of the Bankruptcy Code retains its vitality.

> "This conclusion does not render § 548(a)(2) superfluous since the 'reasonably equivalent value' criterion will continue to have independent meaning (ordinarily a meaning similar to fair market value) outside the foreclosure context." 114 S. Ct. at 1765.

Where money damages against the lender are awarded rather than the case affecting the title to land, § 548(a)(2) should retain its vitality as enacted by Congress. This money judgment as entered by the Bankruptcy Court and affirmed by the District Court should stand.

This Court has consistently required that foreclosure sales satisfy state law. It repeats this in *BFP,* 114 S. Ct. at 1765, 1763.

> "it is 'black letter' law that mere inadequacy of the foreclosure price is no basis for setting the sale aside, though it may be set aside (*under state foreclosure law,* rather than fraudulent transfer law) if the price is so low as to 'shock the conscience or raise a presumption of fraud or unfairness.' [citations including *Gelfert v.*

> *National City Bank of New York,* 313 U.S. 221, 232, 61 S.Ct. 898, 902, 85 L.Ed. 1299 (1941) and *Ballentyne v. Smith,* 205 U.S. 285, 290, 27 S.Ct. 527, 528, 51 L.Ed. 803 (1907)]" 114 S.Ct. at 1763-4.

Gelfert provides:

> "The control of judicial sales of realty by courts of equity and by legislatures in order to prevent sacrificial prices has a long history. . . . And it is quite uniformly the rule in this country, as in England, that while equity will not set aside a sale for mere inadequacy of price, it will do so if the inadequacy is so great as to shock the conscience or if there are additional circumstances against its fairness . . . .
>
> We mention these matters here because they indicate that for about two centuries there has been a rather continuous effort, either through general rule or by appeal to the chancellor in specific cases, to prevent the machinery of judicial sales from becoming an instrument of oppression.
>
> And so far as mortgage foreclosures are concerned numerous devices have been employed to safeguard mortgagors from sales which will, or may, result in mortgagees collecting more than their due. The variety of formulae which has been employed to that end is ample evidence not only of the intrusion which advanced notions of fairness have made on the earlier concern for stability of judicial sales but also of the flexibility of the standards of fairness themselves." 313 U.S. at 231-233, 61 S. Ct. at 902.

Ballentyne, citing from *Graffam v. Burgess*, 117 U.S. 180, 6 S.Ct. 686 (1886), states the rule as follows:

> "In England the old rule was that in chancery sales, until confirmation of the master's report, the bidding would be opened upon a mere offer to advance the price 10 percent; but this rule has been rejected, and now both in England and this country a sale will not be set aside for mere inadequacy of price unless that inadequacy be so gross as to shock the conscience, or unless there be additional circumstances against its fairness. But if there be great inadequacy, slight circumstances of unfairness in the conduct of the party benefited by the sale will be sufficient to justify setting it aside."

Having said that, this Court in *Ballentyne* then affirmed the lower court's order setting aside the sale "upon the single ground of inadequacy in price." 205 U.S. 289, 290, 27 S.Ct. 528, 529.

In *Graffam*, the borrower received no actual notice and this Court after tracing the history to Lord Eldon's Act in 1867 goes on to conclude, from cases from England and several states, that:

> "From the cases here cited we may draw the general conclusion that if the inadequacy of price is so gross as to shock the conscience, or if, in addition to gross inadequacy, the purchaser has been guilty of any unfairness, or has taken any undue advantage, or if the owner of the property, or party interested in it has been, for any other reason, mislead or surprised, then the sale will be regarded as fraudulent and void . . . . " 117 U.S. at 191, 192, 6 S.Ct. at 692.

It is intriguing that this is pronounced almost as a matter of common law. And both Texas and California have adopted the common law of England, Vernon's Texas Codes Annotated, 1 Civil Practice and Remedies Code § 5.001; California Civil Code § 22.2. There is nothing in these cases that attempts to be restating either the law of the forum state or the situs state. Rather, this is expressed as a matter of common law. We see this same recital of state foreclosure law today, typically in the same words. For instance,

> "Under California law, 'gross inadequacy of price coupled with even slight unfairness or irregularity is a sufficient basis for setting the sale aside.' [citations]" *In re Worcester,* 811 F.2d 1224, 1228 (9th Cir. 1987).

Texas law is to the same effect. *Charter National Bank - Houston v. Stevens,* 781 S.W. 2d 368, 371-4 (Tex. App. Houston 1989); *Jinkins v. Chambers,* 622 S.W. 2d 672 (Tex. App. Tyler 1981).

The cases are now placing a greater duty on the party conducting the sale:

> "The courts scrutinize a sale held under power in a trust deed carefully, and will not sustain it unless it is conducted with fairness, openness, scrupulous integrity and the trustee exercises sound discretion to protect the rights of all interested parties and obtain the best possible price." *Bank of Seoul and Trust Co. v. Marcione,* 198 Cal. App. 3d 113, 119, 244 Cal. Rptr. 1, 3-4 (1988).

We see the same concern by the Texas Supreme Court in *University Savings Association v. Springwoods Shopping*

Center, 644 S.W.2d 705 (Tex. 1982) and *Jasper Federal Savings and Loan Association v. Reddell*, 730 S.W. 2d 672, (Tex. 1987).

The most recent case on this subject, which is *Ford & Vlahos v. ITT Commercial Finance Corp.*, 8 Cal. 4th 1220, 36 Cal. Rptr.2d 464, (1994) is remarkably similar to the opinion of the Bankruptcy Court in this matter, 98 B.R. 983, 992, requiring notice and even advertising based on real estate foreclosure precedent such as *Newman v. Jackson*, 25 U.S.[12 Wheat] 570 (1827), 4 *Casner, American Law of Property* (1952) Mortgages, Section 16.207 pp. 505-509, and provisions of the *Uniform Land Security Interest Act*, but as a matter of state foreclosure law. *In re Cummings*, 173 Bkcy. Rptr. 959 (Bkcy. N.D. Ga. 1994).

Thus the facts found at trial by the Bankruptcy Court support a violation of both state foreclosure law and § 548 of the Bankruptcy Code. This has commonly justified the alternative remedies of either (i) avoiding the foreclosure sale and ordering the real property returned, or (ii) letting title remain with the purchaser at the foreclosure sale and awarding money damages. Since the Bankruptcy Court here awarded money damages, and the District Court affirmed the award of money damages, this case has no impact on "title to land."

Thus, the basis for this Court overruling § 548 in *BFP*, which was § 548 "impinging upon" the "essential state interest . . . 'in the titles to real estate' " is not present in this case. Because the Ninth Circuit has extended the Court's decision in *BFP* to also invalidate the plain meaning of § 548 as applied to an award of money damages, which has no impact on title to land, and because impact on title to land was the reason for this Court overruling Congress on the facts of *BFP*, review should be granted.

3. F.R. CIV. P. 54(b) CERTIFICATION NOT BEING SUFFICIENT, THE TIME FOR FILING NOTICE OF APPEAL ALSO DOES NOT COMMENCE TO RUN UNTIL FINAL JUDGMENT. THIS DECISION IS IN CONFLICT WITH THE DECISION OF ANOTHER UNITED STATES COURT OF APPEALS ON THIS IMPORTANT MATTER.

This decision of the Ninth Circuit is in conflict with the decision of the Second Circuit in *Ansam Assoc., Inc. v. Cola Petroleum, Ltd.*, 760 F.2d 442 (2nd Cir. 1985). This decision creates a conflict in the circuits, and attempts to force premature appeals and then motions to dismiss. *Ansam* should control.

The summary judgment order entered by the Bankruptcy Court contained conclusory language also contained in Rule 54(b). Beneficial moved to dismiss the appeal of the Lindsay Entities from that order after final judgment had been entered as not timely, on the theory that inclusion of that conclusory language amounted to a certification for immediate appeal under F.R. Civ. P. 54(b).

The Bankruptcy Court had not been asked to make any such certification, and had not made any findings to support any such certification.

The District Court denied that motion, holding that no such findings were made, and likely would not have been appropriate.

> "Appellants correctly argue that the bankruptcy court did not properly make a finding

that there was no just reason for delay. The orders, prepared for the court by counsel, do not include any discussion of the basis for the finding, but merely include the conclusory language 'There is no just reason for delaying entry of this judgment as to those causes of action for which summary judgment is granted, and judgment shall so be entered.' Although Rule 54(b) itself does not require that reasons be given for making the determination, all the circuit courts which have addressed the issue have held that the lower court has an obligation to explain its conclusion that there is 'no just reason for delay' in entering final judgment. [citations including *Santa Maria v. Owens-Illinois, Inc.*, 808 F.2d 848, 854-55 (1st Cir. 1986); *Ansam Assoc., Inc. v. Cola Petroleum, Ltd.*, 760 F.2d 442, 445-46 (2nd Cir. 1985), *Allis-Chalmers Corp. v. Philadelphia Electric Co.*, 521 F.2d 360, 364 (3rd Cir. 1975) and cases from the 5th, 6th and 8th circuits.] The Ninth Circuit has not ruled on this issue.

The reasons given for such a requirement are persuasive. Rule 54(b) provides an exception to the general rule against piecemeal disposal of litigation. See *Santa Maria v. Owens-Illinois, Inc.*, 808 F.2d at 854. A court 'should grant Rule 54(b) certification only where there exists 'some danger of hardships or injustice through delay which would be alleviated by immediate appeal.'' *Ansam Assoc. v. Cola Petroleum, Ltd.*, 760 F.2d at 445 (citing *Campbell v. Westmoreland Farm Inc.*, 403 F.2d 939, 942 (2d Cir. 1968)).

As the First Circuit stated in *Santa Maria*, a 'talismanic statement in the judgment that 'there is no just reason for delay in the entry of Final

Judgment' is not sufficient to signal a deliberative and properly considered discretionary decision on whether, weighing all the competing concerns and interests' to permit an early and piecemeal appeal. *Santa Maria v. Owens-Illinois*, 808 F.2d at 854. In *Allis-Chalmers*, the Third Circuit observed:

> It is essential . . . that a reviewing court have some basis for distinguishing between well-reasoned conclusions arrived at after a comprehensive consideration of all relevant factors, and mere boiler-plate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law.

Allis-Chalmers Corp. v. Philadelphia Electric Co., 521 F.2d at 364. Moreover, even where the lower court properly supports its certification, 'Rule 54(b) should not be used routinely, but rather should be reserved for the 'infrequent harsh case' where certification serves the interests of justice and judicial administration.' *Knafel v. Pepsi Cola Bottlers of Akron, Inc.*, 850 F.2d at 1159-60 (citations omitted). Such certification 'should not be entered routinely or as a courtesy or accommodation to counsel.' *Panichella v. Pennsylvania Railroad*, 252 F.2d 452, 455 (3rd Cir. 1958).

Accordingly, since the bankruptcy court's June 6, 1988 order and June 22, 1988 amended order did not adequately set forth any reasoned explanation for entry of a final judgment as to the dismissed claims, or even alert the parties to the invocation of Rule 54(b), the order was not a sufficient Rule 54(b) certification. As a result, the 10-day appeals period did not begin to run

> until September 8, 1989 when the Court entered its final judgment on the remaining claims after trial." App. 81-83.

The District Court found for Lindsay Entities on the appeal of that order also. The Ninth Circuit reversed that holding, on the basis that the

> "erroneous Rule 54(b) determination . . . start[ed] the running of the time for appeal." 59 F.3d at 951.

This is in direct conflict with the decision of the Second Circuit in *Ansam Associates v. Cola Petroleum, Ltd.*, 760 F. 2d 442 (2d Cir. 1985).

It also runs against the "general rule against piecemeal disposal of litigation," to quote the District Court. The Ninth Circuit, instead, by this decision requires premature appeal and then a motion to dismiss the appeal because of the lack of appropriate findings. *Ansam*'s allowing appeal of all issues after entry of final judgment is preferable.

We urge this Court to grant review, recognizing that if this Court agrees with Petitioners in either Point 1 or Point 2 above, the summary judgment claims held untimely in this decision are only alternative grounds for reaching the same result.

◆

CONCLUSION

The Lindsay Entities as "known or ascertainable [secured] creditors" were entitled to actual notice of the foreclosure sale here as the "known or ascertainable [unsecured] creditors" were entitled to actual notice of the probate proceeding in *Tulsa Professional Collection Services v. Pope Services.*

The United States Court of Appeals for the Ninth Circuit has entered this decision in conflict with the decision of another United States court of appeals, *Ansam Assoc., Inc. v. Cola Petroleum, Ltd.*, on the same important matter, which is when the time for filing notice of appeal begins to run after an insufficient F.R. Civ. P. 54(b) certification. *Ansam* should be left to stand.

The decision of this Court in *BFP* should not be extended to overrule § 548 of the Bankruptcy Code where only money damages are awarded since that does not impact "the security and stability of title to land," which was the basis for this Court overruling § 548 in *BFP.*

For these reasons, review should be granted.

Dated: November 27, 1995

Respectfully submitted;

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: JOHN R. LINDSAY,

Debtor.

JOHN R. LINDSAY; LINDSAY ENTERPRISES, INC., A California Corporation; IMA 79-6, A California Limited Partnership; and, IMA 81-3, A California Limited Partnership,

Plaintiffs-Appellants,

v.

BENEFICIAL REINSURANCE COMPANY, A Corporation; BENEFICIAL STANDARD LIFE INSURANCE COMPANY, A Corporation and Does 1-100, Inclusive,

Defendants-Appellees.

Nos. 92-55224
92-55227

D.C. No.
CV-89-1537-GT

OPINION

In re: John R. Lindsay,
Debtor.

John R. Lindsay, A California Corporation; Paul Bushard,
Plaintiffs-Appellants,

v.

Beneficial Reinsurance Company, A Corporation; Beneficial Standard Life Insurance Company, A Corporation and Does 1-100, Inclusive,
Defendants-Appellees.

No. 92-55266

D.C. No.
CV-90-0586-GT

In re: John R. Lindsay,
Debtor.

John R. Lindsay, A California Corporation; IMA, A California Limited Partnership,
Plaintiffs-Appellees,

v.

Beneficial Reinsurance Company, A Corporation; Beneficial Standard Life Insurance Company, A Corporation and Does 1-100, Inclusive,
Defendants-Appellants.

No. 92-55268

D.C. No.
CV-89-1536-GT

In re: John R. Lindsay,

Debtor.

John R. Lindsay, A California Corporation; IMA, A California Limited Partnership,

Plaintiffs-Appellees,

v.

Beneficial Reinsurance Company, A Corporation; Beneficial Standard Life Insurance Company, A Corporation and Does 1-100, Inclusive,

Defendants-Appellants.

No. 92-55270

D.C. No.
CV-89-127-GT

Appeals from the United States District Court
for the Southern District of California
Gordon Thompson, Jr., District Judge, Presiding

Submission Deferred July 9, 1993*
Resubmitted June 24, 1994
Pasadena, California

Filed July 12, 1995

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* The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34 (a) and Ninth Circuit Rule 34-4.

Before: Floyd R. Gibson[**], Cynthia Holcomb Hall and Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Kleinfeld

COUNSEL

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Phillip M. Adeleson and Patric J. Kelly, Adleson, Hess, Christensen & Kelly, for the amicus curiae, California Trustee's Association and California Land Title Association, in support of the appellants.

Robert L. Rentto, San Diego, California, for the plaintiffs-appellants-cross-appellees.

OPINION

KLEINFELD, Circuit Judge:

This case requires us to construe the "reasonably equivalent value" standard in bankruptcy law for determining whether a conveyance is fraudulent. We deferred submission before the case was scheduled to be argued because the Supreme Court had granted *certiorari* in a case which would resolve the controlling issue. After the Supreme Court decision came down, *BFP v. Resolution*

[**] The Honorable Floyd R. Gibson, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

Trust Corporation, 114 S.Ct. 1757 (1994), we obtained supplemental briefs from the parties on its effect, and now apply it to the case at bar. Because the Supreme Court rejected the doctrine applied by the bankruptcy court in its published decision at *In re Lindsay*, 98 B.R. 983 (Bankr.S.D.Cal. 1989), we must reverse.

I. FACTS.

John Lindsay was the president of Lindsay Enterprises, Inc., which itself was the general partner in two limited partnerships, called IMA 79-6 and IMA 81-3. The limited partnerships borrowed $1.4 million from Beneficial Reinsurance Company to invest in an apartment complex in Texas called Greenway Plaza Apartments. The limited partnerships' note to Beneficial was secured by a deed of trust.

The limited partnerships sold the real estate to Greenway Plaza Investment Company. Greenway's note for $2.1 million was secured by a second deed of trust on the real estate, junior to Beneficial's. The Texas real estate market declined, and Greenway defaulted on its note to the limited partnerships and filed for bankruptcy in Texas.

Beneficial successfully moved for relief from the automatic stay so that it could foreclose. Its lawyers negotiated with the limited partnerships' lawyers about how they would proceed, because both had an interest in the property. Beneficial sent its notice of the foreclosure to the address it had in its records for the general partner and the limited partnership, but they had moved and did not receive the notice.

About seven months before the foreclosure, the debtors' lawyer sent Beneficial's lawyer a letter asking for a copy of any order Beneficial and Greenway agreed upon to modify the automatic stay, and Beneficial's lawyer agreed to send it to him when received. The order modifying the automatic stay in bankruptcy would enable Beneficial to foreclose. The bankruptcy court noted that debtors' lawyers could have obtained notice from the bankruptcy court in Texas by filing a request there, but did not.

When Beneficial gave notice of foreclosure, it did not send notice to the debtors' lawyers. Beneficial's trustee was its lawyer, in the same firm as the lawyer who six months before had undertaken to send a copy of any agreed order vacating the stay. He did not cross copy the debtors' lawyers on the notice of foreclosure. At the foreclosure sale, Beneficial bid the property in for $1.5 million, about $100,000 less than the balance due on its note plus additional chargeable items. At all relevant times since, Beneficial has operated the property, spending substantial amounts on refurbishing and collecting the rents itself as owner.

The limited partnerships, the general partner and Lindsay sued in bankruptcy court on numerous grounds, seeking to have the foreclosure sale to Beneficial set aside as a fraudulent conveyance, and other relief. Beneficial won summary judgment on all the claims except for fraudulent conveyance and improper notice of the sale. Those two claims went to trial. The bankruptcy court granted a declaratory judgment that the foreclosure sale "was regularly conducted under Texas law," but granted a money judgment to the plaintiffs for about $836,000, the difference between fair market value of the real estate and the amount of Beneficial's bid, on the ground that the conveyance was fraudulent.

On appeal, the district court affirmed the bankruptcy court's judgment in favor of the limited partnerships on the fraudulent conveyance issue, but reversed the declaratory judgment in favor of Beneficial on compliance with Texas law, and remanded for consideration "as to whether Beneficial's imputed knowledge of *other* IMAs' address constituted knowledge of the plaintiff IMAs' address, thereby rendering Beneficial's notice of foreclosure sale insufficient under Texas law." (emphasis in original). The district court also reversed the summary judgment on plaintiffs' other claims on the ground that there were genuine issues of material fact.

Numerous other parties and issues have also been the subject of bankruptcy court and district court decisions in this group of cases, which are also on appeal. These other disputes will be set out in the analysis sections dealing with them.

II. ANALYSIS.

A. Fraudulent Conveyance.

Beneficial appeals, in No. 92-55268, the fraudulent conveyance judgment. The decision in *BFP v. Resolution Trust Corporation,* 114 S.Ct. 1757 (1994), affirming our decision in *BFP v. Imperial Sav. & Loan Ass'n (In re BFP),* 974 F.2d 1144 (9th Cir. 1992), requires us to reverse.

The Statute of 13 Elizabeth invalidated transfers "to delay, hinder or defraud creditors." Among what came to be recognized as "badges of fraud" was "grossly inadequate consideration." *BFP,* 114 S.Ct. at 1763. The bankruptcy law codifies fraudulent conveyance law by providing that the trustee may avoid a transfer within a year prior to filing, if the debtor made the transfer "to hinder, delay, or defraud" creditors, or the debtor "received less than a reasonably equivalent value in exchange":

> (a) The trustee may avoid any transfer of an interest of the debtor in the property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily –
>
> (1) made such transfer or incurred such obligation with the actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or
>
> (2)(A) *received less than a reasonably equivalent value in exchange for such transfer or obligation;* and
>
> (B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;
>
> (ii) was engaged in business or a transaction, or was about to engage in business or transaction, for which any property remaining with the debtor was unreasonably small capital; or

> (iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.
>
> . . .
>
> (2) In this section –
>
> (A) "value" means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unpermitted promise to furnish support to the debtor or to a relative of the debtor;

11 U.S.C. § 548, emphasis added. A foreclosure sale is treated as a transfer from the debtor to the foreclosing creditor for purposes of 11 U.S.C. § 548. 11 U.S.C. § 101(54).

The bankruptcy court made findings of fact after trial. Beneficial challenges them, but because of *BFP*, we need not reach the question of whether the findings favorable to the debtors were clearly erroneous. Assuming that the findings are correct, the conclusion must nevertheless be set aside.

The issue on which the bankruptcy court ruled against Beneficial was whether the foreclosure sale should be set aside because Beneficial bid in the real estate for "less than a reasonably equivalent value in exchange." 11 U.S.C. § 548(a)(2)(A). The circuits were split on the question of what this provision meant. One said it meant reasonably equivalent to (at least 70% of) fair market value, *Durrett v. Washington Nat. Ins. Co.*, 621 F.2d 201 (5th Cir. 1980), one said that the price received at a noncollusive foreclosure sale regularly conducted under state law was rebuttably equivalent to fair market value, *In re Bundles*, 856 F.2d 815, 820 (7th Cir. 1988), and two said the price so obtained was conclusively presumed to have returned "reasonably equivalent value." *In re BFP*, 974 F.2d at 1149; *In re Winshall Settlor's Trust*, 758 F.2d 1136, 1139 (6th Cir. 1985). Our decision in *In re BFP* had not yet come down when the bankruptcy court ruled.

The bankruptcy court found, applying a variant of the *Bundles* approach, that Beneficial bid in the property for less than "reasonably equivalent value." The reason was that its successful bid was only 64% of "fair market value" determined by appraisal, although the bid was 83% of what "bottom-fishers" offered shortly after the foreclosure sale. The district court affirmed, but on the *Durrett* theory. We review *de novo*, *In re Frontier Properties, Inc.*, 979 F.2d 1358, 1362 (9th Cir. 1992), and reverse, because of the subsequent Supreme Court decision resolving the intercircuit conflict.

The Supreme Court granted *certiorari* in *In re BFP* and affirmed our decision in that case. *BFP v. Resolution Trust Corporation*, 114 S.Ct. 1757, 1767 (1994). *Durrett* and *Bundles* were both rejected. *BFP* involved a foreclosure sale in which the successful bid was $433,000 on a house with an alleged fair market value of $725,000, a 60% ratio which would have failed the *Durrett* test. The sale was found by the bankruptcy court to be in compliance with state law and neither collusive nor fraudulent. In order to assure security of real estate titles, and preserve the traditional role of state law in determining the adequacy of foreclosure sales, the Court adopted an irrebuttable presumption of "reasonably equivalent value" for foreclosure sales properly conducted under state law:

> We deem, as the law has always deemed, that a fair and proper price, or a "reasonably equivalent value," for foreclosed property, is the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with.
>
> . . .
>
> . . . Any irregularity in the conduct of the sale that would permit judicial invalidation of the sale under applicable state law deprives the sale price of its conclusive force under § 548(a)(2)(A), and the transfer may be avoided if the price received was not reasonably equivalent to the property's actual value at the time of the sale (which we think would be the price that would have been received if the foreclosure sale had proceeded according to law).

Id. at 1765. In dictum, the Court suggested that collusive sales "are likely" subject to attack under the "actual intent" subsection, 11 U.S.C. § 548(a)(1).

Under *BFP,* Beneficial was entitled to judgment as a matter of law that the foreclosure sale was not a fraudulent conveyance, so long as "all the requirements of the State's foreclosure law have been complied with." *BFP,* 114 S.Ct. at 1757. It could be set aside only if there were "irregularity in the conduct of the sale that would permit judicial invalidation of the sale under applicable state law." *Id.* Even if there were such an irregularity, that alone would not permit setting aside the foreclosure sale as a fraudulent conveyance. It would only destroy the irrebuttability of the presumption that the price was "reasonably equivalent value." The transfer could then be avoided if the price received was not reasonably equivalent to "the price that would have been received if the foreclosure sale had proceeded according to law." *Id.*

Failure of the foreclosure sale to return a price reasonably equivalent to fair market value is, under the Supreme Court decision in *BFP,* immaterial. The Appellees won the case below because the price was too small a percentage of fair market value, but that ground cannot stand. Their brief filed after *BFP* came down argues that inadequacy of price so great as to shock the conscience would still be a ground for setting aside the sale. Gross inadequacy of price is a ground for setting aside the foreclosure, under *BFP,* if state law so provides, but it is not a federal standard independent of state law enabling a bankruptcy court to set aside a foreclosure sale. Likewise, commercial reasonableness is a ground only if it is a state ground.

B. Choice of Law.

In order to decide whether the foreclosure complied with state law, *see BFP* at 1765, we must first decide whether California or Texas law should govern the foreclosure. The rule in diversity cases, that federal courts must apply the conflict of laws principles of the forum state, *Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U.S. 487, 496 (1941), does not apply to federal question cases such as bankruptcy. *Compare In re Holiday Airlines Corp.,* 620 F.2d 731, 733-35 (9th Cir. 1980); *In re Chocise College Park, Inc.,* 703 F.2d 1339, 1348 n. 4 (9th Cir. 1983); *Chuidian v. Philippine Nat'l Bank,* 976 F.2d 561, 564 (9th Cir. 1992).

In federal question cases with exclusive jurisdiction in federal court, such as bankruptcy, the court should apply federal, not forum state, choice of law rules. *Chiudian*, 976 F.2d at 564; *Holiday Airlines*, 620 F.2d at 733-35; *cf. Chocise College Park*, 703 F.2d at 1348 n. 4; *In re Merritt Dredging Co.*, 839 F.2d 203, 205 (4th Cir. 1988); *Woods-Tucker Leasing Corp. v. Hutcheson-Ingram Development Co.*, 642 F.2d 744, 747-49 (5th Cir. 1981); *In re Koreag, Controle Et Revision S.A.*, 961 F.2d 341, 350-51 (2d Cir. 1992); *In re Morris*, 30 F.3d 1578, 1581-82 (7th Cir. 1994). In such cases, the risk of forum shopping which is avoided by applying state law has no application, because the case can only be litigated in federal court. The value of national uniformity of approach need not be subordinated, therefore, to differences in state choice of law rules.

Texas law controls in this case, because the real estate foreclosed on is in Texas. In *BFP*, the Supreme Court rested its decision in part on the proposition that "the power to ensure [ ] security [of the titles to real estate] 'inheres in the very nature of [state] government." *Id.* at 1764-65 (quoting *American Land Co. v. Zeiss*, 219 U.S. 47, 60 (1911)). The security of land title in Texas should not be compromised by applying the law of a different state to Texas foreclosure sales. "The method for the foreclosure of a mortgage on land and the interests in the land resulting from the foreclosure are determined by the local law of the situs." Restatement (Second) of Conflict of Laws § 229 (1971). The deed of trust said that any foreclosure sale should follow Texas law. No serious argument can be made for applying the law of any state but Texas to the Texas real estate foreclosure.

C. Compliance With Texas Law.

The bankruptcy court found that the foreclosure sale complied with Texas law. It found that the sale was noncollusive, and notice was proper. Under Texas law, if that is so, the foreclosure stands.

In Texas "[m]ere inadequacy of consideration alone does not render a foreclosure sale void if the sale was legally and fairly made." *Tarrant Sav. Ass'n. v. Lucky Homes, Inc.,* 390 S.W.2d 473, 475 (Tex. 1965). The Fifth Circuit has held that under Texas law, for inadequacy of consideration to invalidate the foreclosure sale, "there must also be some irregularity in the foreclosure which caused or contributed to cause the real property to be sold for a grossly inadequate price." *Savers Federal Sav. & Loan Ass'n v. Reetz,* 888 F.2d 1497, 1503 (5th Cir. 1989).

The only issue on appeal before us, regarding compliance with Texas law, is whether notice of the foreclosure sale should have been mailed to the debtors' new address.[1] This issue is material to whether the foreclosure sale was conducted "legally and fairly" under Texas law. The bankruptcy court found that the notice was proper, but the district court reversed and remanded for additional findings. The facts are not at issue. The bankruptcy court and district court determinations of Texas law are reviewed *de novo. In re Qintex Entertainment, Inc.,* 8 F.3d 1353, 1355 (9th Cir. 1993).

The deed of trust requires that notice be posted on the courthouse door and mailed to the debtors, or as might otherwise be required by Texas law. The courthouse door notice is not at issue, nor did the debtors dispute Beneficial's claim that it had mailed notice of the foreclosure sale. The only issue relates to the address to which Beneficial mailed the notice. The deed of trust says that Beneficial should mail the notice of foreclosure to "the most recent address for such parties in the records of the Beneficiary." The deed of trust provides that the debtors all share the address of 3456 Camino Del Rio North, Suite 101, San Diego, California 92108. Beneficial mailed notice to that address.

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[1] This issue controls appeal Nos. 92-55224 & 92-55227.

The debtors were no longer at this address, and did not receive the notice. Their new address was 9225 Mira Mesa Boulevard, Suite 208, P.O. Box 261249, San Diego, California 92126. Mr. Lindsay's address was used for all the debtors, and he had moved. The debtors provided evidence that Beneficial's lawyers, one of whom was the trustee on the deed of trust, had, about six months before the foreclosure, sent mail in a different case to others of the limited partnerships in which Mr. Lindsay was general partner at the new address. The limited partnerships to which mail was sent at the new address were IMA 79-8, 78-1, 77-4, and 76-2. The limited partnerships involved in the case at bar are IMA 79-6 and IMA 81-3. The district court held that its lawyer's knowledge of the debtors' new address would be imputed to Beneficial, and remanded so that the bankruptcy court could determine whether the lawyer's knowledge of the new address of others of the limited partnerships "constituted knowledge" of the new address of the limited partnerships which were involved in the case at bar.

We conclude that the notice was adequate as a matter of Texas law. The deed of trust specified that notice should be sent to the "most recent address for such parties *in the records of Beneficiary,*" not in the records of the trustee. There was no evidence that Beneficial, the beneficiary, had the debtor's new address in its records. The deed of trust provided that the debtors could change the address to which notices thereunder would have to be sent by Beneficial, by mailing Beneficial a written notice of change of address. Although they could have assured themselves of notice of foreclosure by sending Beneficial a notice of change of address, and knew that foreclosure was the likely consequence of Greenway's bankruptcy and their own, the debtors never, so far as the record reveals, sent Beneficial notice of change of address.

After the case was tried and the decision was made in bankruptcy court, the debtors moved to reopen the case so that they could do additional discovery of Beneficial's records to determine whether it had some indication of their new address. The judge denied the motion because the debtor's request for production had been vague and whatever they had not obtained was their own fault, especially because of the general access Beneficial had given debtors' lawyer to its files. The district court affirmed this denial of the motion to reopen, and so do we. The standard of review is "clear abuse of discretion," and the ruling was eminently reasonable. *United States v. Bransen,* 142 F.2d 232, 235 (9th Cir. 1944); *Coastal Transfer Co. v. Toyota Motor Sales,* 833 F.2d 208, 211-12 (9th Cir. 1987).

The Texas statute, like the deed of trust, makes the address for notice the "address as shown by the records of the holder of the debt." Tex.Prop.Code Ann. § 51.002(e) (West 1993) (formerly Article 3810). That means, in the context of a deed of trust, the beneficiary's records, not the trustee's. Texas law, according to its intermediate court of appeals, does not allow notice in the trustee's records, or in the records of the beneficiary's lawyer, to substitute for notice in the records of the beneficiary. *See Dillard v. Broyles,* 633 S.W.2d 636, 641 (Tex.Ct.App. 1982). The general rule that a party is charged with knowledge of his lawyer, *Carter v. Converse,* 550 S.W.2d 322, 329 (Tex.Civ.App. 1977), does not apply to this case, because the Texas statute and the language of the deed of trust make the beneficiary responsible to mail notice only to the address in its file. The debtors provided no evidence from which an inference could be drawn that Beneficial had their new address in its records. *Cf. Lido Int'l, Inc. v. Lambeth,* 611 S.W.2d 622, 624 (Tex. 1981).

Even if the Texas Supreme Court were to adopt the proposition that if the trustee or the beneficiary's lawyer knew of the debtor's new address, then notice of foreclosure would have to be sent to that address under Texas law, the debtors still could not prevail. The lawyer-trustee did not have *their* address shown as such in his file. Lindsay was the general partner for numerous similarly named limited partnerships. The debtors' evidence showed only that some others of the Lindsay-related limited partnerships, not the ones involved in the case at bar, had *their* new addresses in the lawyers' files. The limited partnerships foreclosed upon in this case did not have their new address in the lawyer-trustee's files.

Thus neither the beneficiary, as required by the deed of trust and the Texas statute, nor the beneficiary's lawyer and trustee, had the debtors' new address in their records. At best, they had other debtors' addresses in their files, and they might have inferred that the debtors at issue should be sent mail at that same address. It might have been prudent, for purposes of avoiding years of litigation on the notice issue, as well as courteous, to cross copy the debtors' lawyer on the notice of foreclosure, and to mail the notice of foreclosure to the new address of other Lindsay limited partnerships as well as the address in Beneficial's records, but Texas law did not require it. Beneficial had no duty, under the deed of trust and Texas law, to have its lawyer infer that if some of Lindsay's limited partnerships had new addresses, probably the ones at issue did too, and mail notice to the new address. Beneficial and its lawyer-trustee were acting as an unpaid creditor with a deed of trust, not as private detectives, and did all they were obligated to do under Texas law. Accordingly, the bankruptcy court correctly determined that the foreclosure sale was conducted in accord with Texas law.

D. Late Appeal.

The bankruptcy court granted summary judgment in favor of Beneficial on five of plaintiffs claims: (1) violation of the automatic stay, (2) breach of contract, (3) breach of contract – promissory estoppel, (4) fraud and deceit, and (5) negligent misrepresentation. The district court reversed the bankruptcy court on the grounds that plaintiffs established genuine issues of material fact. Beneficial appeals.[2]

Beneficial argues that the district court erroneously denied its motion to dismiss the debtors' appeal as untimely. We agree. The bankruptcy court issued a decision and order June 17 granting summary judgment for Beneficial on the five issues described above, but denying it on the fraudulent conveyance issue. The order says "the Order shall be entered as judgment" as to claims 1, 4, 5, 6 and 7, and that "there is no just reason for delaying entry of judgment." The debtors filed a timely Rule 59 motion for reconsideration based on newly discovered evidence, which was denied December 1. That December 1 denial started the appeal time running. *See* Bankr.Proc.R. 8002(b).

The December 1 decision said that the court "will consider the defendants' request for sanctions after the trial has been completed, as requested by [Beneficial]." On April 18, the court sent a letter to counsel explaining why the motion for reconsideration was frivolous, and directing Beneficial to provide a declaration of its fees and costs for opposing the motion so that sanctions could be imposed. On June 30, the bankruptcy court issued an order awarding $2,315 in sanctions in favor of Beneficial on the ground that the motion for reconsideration had been frivolous. The debtors filed notice of appeal July 20, of the June 6 order granting summary judgment, the June 22 amended order, the April letter, and the July sanctions award.

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[2] Appeal No. 92-55270.

Under Bankruptcy Rule 8002(a), a party must file a notice of appeal "within 10 days of the date of the entry of the judgment, order, or decree appealed from." That ten day period ran from December 1. Bankr.Proc.R. 8002(b). A Rule 54(b) judgment does not give the prospective appellant an election to appeal at that time or later, when the entire case is over; such a judgment is "final as to the claims and parties within its scope, and could not be reviewed as part of an appeal from a subsequent judgment as to the remaining claims and parties." *Williams v. The Boeing Co.*, 681 F.2d 615, 616 (9th Cir. 1982). The debtors filed their notice of appeal to the district court seven months after the deadline.

The district court ruled otherwise on the ground that the bankruptcy court erred in granting Rule 54(b) certification, because it made only a summary determination of "no just reason for delay," without making any findings. The district court was correct about the inadequacy of the findings. The court making a Rule 54(b) determination "should not direct entry of judgment under Rule 54(b) unless it has made specific findings setting forth the reasons for its order." *Morrison-Knudsen v. Archer*, 655 F.2d 962, 965 (9th Cir. 1981); *see also Cadillac Fairview/California, Inc. v. United States*, 41 F.3d 562, 567 (9th Cir. 1994) (Kleinfeld, J. dissenting). The dangers of profligate Rule 54(b) determinations have materialized in this case. We and the parties have been burdened with the time and expense of five appeals, and 334 pages of briefs, in significant part because of the routine 54(b) determinations issued for interlocutory rulings. Even though counsel agreed on the Rule 54(b) language in the lodged orders, the bankruptcy judge should have stricken it.

The district court erred, though, in its conclusion that an erroneous Rule 54(b) determination does not start the running of the time for appeal. We have held that "the lack of *Morrison-Knudsen* findings is not a jurisdictional defect." *Alcan Aluminum Corp. v. Carlsberg Financial Corp.*, 689 F.2d 815, 817 (9th Cir. 1982); *see also Sheehan v. Atlanta International Insurance Co.*, 812 F.2d 465, 468 n. 1 (9th Cir. 1987). Had the debtors appealed within ten days, the district court might have had discretion to dismiss the appeal because of the bankruptcy court's failure to make appropriate findings, *see Cadillac Fairview/California*, 41 F.3d at 567. But they appealed too late, so the district court lacked jurisdiction. A Rule 54(b) determination, right or wrong, starts the time for appeal running. This avoids uncertainty for counsel about when to appeal. Counsel should not have asked for Rule 54(b) determinations, or obtained them without findings, but they got them, and must bear the consequences. The time for appeal expired before they filed notice of appeal. Untimely notice of appeal is a jurisdictional defect, so the district court lacked jurisdiction to vacate the summary judgment on appeal. *In re Slimick*, 928 F.2d 304, 306 (9th Cir. 1990); *In re Souza*, 795 F.2d 855, 857 (9th Cir. 1986).

We therefore do not reach the merits of the summary judgment determinations which the district court vacated. Because the debtors appealed too late, the bankruptcy court's partial summary judgment in favor of Beneficial must be reinstated.

E. The Successors.

After the debtors filed bankruptcy, Bushard and a large number of people who allegedly had loaned $540,000 to the limited partnerships, as well as Lindsay and the limited partnerships themselves, filed another lawsuit in state court. By the time the Bushard plaintiffs served their complaint on Beneficial, the bankruptcy court had decided the limited partnerships' and Lindsay's case and published its opinion. The Bushard plaintiffs claimed in their state court lawsuit, subsequently removed to bankruptcy court, that their loans were secured by the limited partnerships' interests in the Greenway note and deed of trust. One plaintiff, LEI Properties, Inc. alleges that it "is the successor entity to the Bankruptcy Estates of LEI, L.E.I. Properties, Inc., Investment Management Associates, Commonwealth Property Management Corporation and John R. Lindsay." Their complaint is drafted by the same lawyer as the limited partnerships' complaint, and is substantially identical, except that it adds a claim that because the foreclosure sale was improperly conducted Beneficial became a trustee for the debtors' other creditors and had breached its fiduciary duty to them, and it omits the claims of fraudulent conveyance and violation of the automatic stay. Beneficial removed the case to bankruptcy court March 18, 1988. The bankruptcy court dismissed it for failure to state a claim upon which relief could be granted, because the matter was res judicata. The limited partnerships had already been defeated on these claims, and the investors' claims derived from the limited partners. The district court affirmed.

The Bushard plaintiffs are variously creditors, successors-in-interest of the limited partnerships and the general partner, and the identical parties to the Lindsay complaint. Any claim based on status as a creditor must have been filed with the bankruptcy court as part of that litigation. See 11 U.S.C. §§ 501(a), 727(b). Res judicata bars the claims of the successors in interest. *See* Restatement (Second) of Judgments § 43 (1982). The Bushard appellants argue on appeal[3] that their claim is not identical, so cannot be barred. The claims are a subset of the limited partners' claims, except for the resulting trust theory, which depends entirely on the proposition that the foreclosure sale was improper. These differences are no barrier to res judicata. *See* Restatement (Second) of Judgments § 24 ("the claim extinguished includes all rights . . . with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose."); *see also id.* at § 25 (res judicata is bar even where second action presents new evidence or new theories). We affirm the dismissal.

III. CONCLUSION.

The district court's judgments affirming the bankruptcy court's dismissal of the Bushard plaintiffs' complaint (Appeal No. 92-55266) and affirming the bankruptcy court's denial of the Lindsay plaintiffs' motion to reopen the case and discovery (Cross-appeal No. 92-55224) are affirmed. The district court's judgments affirming the bankruptcy court's fraudulent conveyance determination (Appeal No. 92-55268), reversing the bankruptcy court's declaratory judgment on compliance of the sale with Texas law, (Cross-appeal No. 92-55227), and reversing the bankruptcy court's partial summary judgment (Appeal No. 92-55270) are reversed. All the cases are remanded to the district court, for proceedings and entry of judgments in accord with this opinion.

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[3] Appeal No. 92-55266.

AFFIRMED in part, REVERSED in part, and REMANDED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re:

JOHN R. LINDSAY,

Debtor.

JOHN R. LINDSAY; LINDSAY ENTERPRISES, INC., A California Corporation; IMA 79-6, A California Limited Partnership; and, IMA 81-3, A California Limited Partnership,

Plaintiffs-Appellants,

v.

BENEFICIAL REINSURANCE COMPANY, A Corporation; BENEFICIAL STANDARD LIFE INSURANCE COMPANY, A Corporation and DOES 1-100, Inclusive,

Defendants-Appellees.

No. 92-55224
92-55227

D.C. No.
CV-89-1537-GT

(Filed
Aug. 31, 1995)

In re:

JOHN R. LINDSAY,

Debtor.

No. 92-55266

D.C. No.
CV-90-0586-GT

JOHN R. LINDSAY, A California Corporation; PAUL BUSHARD,

Plaintiffs-Appellants,

v.

BENEFICIAL REINSURANCE COMPANY, A Corporation; BENEFICIAL STANDARD LIFE INSURANCE COMPANY, A Corporation and DOES 1-100, Inclusive,

Defendants-Appellees.

In re:

JOHN R. LINDSAY,

Debtor.

No. 92-55268

D.C. No.
CV-89-1536-GT

JOHN R. LINDSAY, A California Corporation; IMA, A California Limited Partnership,

Plaintiffs-Appellees,

v.

BENEFICIAL REINSURANCE COMPANY, A Corporation; BENEFICIAL STANDARD LIFE INSURANCE COMPANY, A Corporation and DOES 1-100, Inclusive,

Defendants-Appellants.

In re:
JOHN R. LINDSAY,
Debtor.

JOHN R. LINDSAY, A California Corporation; IMA, A California Limited Partnership,
Plaintiffs-Appellees,
v.
BENEFICIAL REINSURANCE COMPANY, A Corporation; BENEFICIAL STANDARD LIFE INSURANCE COMPANY, A Corporation and DOES 1-100, Inclusive,
Defendants-Appellants.

No. 92-55270
D.C. No. CV-89-1270-GT
ORDER

Before: GIBSON*, HALL and KLEINFELD, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judge Hall and Judge Kleinfeld vote to reject the suggestion for rehearing en banc. Judge Gibson would so recommend.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

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* The Honorable Floyd R. Gibson, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re

JOHN R. LINDSAY,

Debtor.

Related Bankruptcy Cases
Nos. 86-00748-LM11;
85-03241-LM11; 86-04210-LM11;
86-04209-LM11.

JOHN LINDSAY, et al.,

Plaintiffs,

v.

BENEFICIAL REINSURANCE
COMPANY, et al.,

Defendants.

Civ. No. 89-1270

MEMORANDUM DECISION AND ORDER

(Filed Jan. 9, 1992)

I

INTRODUCTION

Before the court is a set of four appeals. Each arises from a final order of the United States Bankruptcy Court for the Southern District of California. All concern the Bankruptcy Court's handling of a single series of estates. Appeal number 1, further described below, is the subject of this order. Appeals numbers 2, 3 and 4 are the subject of three further orders. For the sake of brevity, the court hereby incorporates in all four orders the findings of fact rendered in each.

A. Breakdown of the Parties

The parties to the adversary proceedings on which appeals numbers 1-3 are based are:

Plaintiffs/Debtors:

1. John R. Lindsay, an individual;
2. Lindsay Enterprises, Inc. ("LEI");
3. Investment Management Associates 79-6, a limited partnership ("IMA 79-6"); and
4. Investment Management Associates 81-3, a limited partnership ("IMA 81-3"),[1]

collectively known as the "Lindsay entities;" and

Defendants/Creditors:

1. Beneficial Reinsurance Company, Inc.;
2. Beneficial Standard Life Insurance Company, Inc.; and
3. 100 Doe defendants,

collectively known as "Beneficial."

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[1] Except where otherwise noted in this and its companion three orders, the phrases "the IMAs" and "the IMA partnerships" are intended to refer to IMAs 79-6 and 81-3 only.

The parties to the adversary proceedings on which appeal number 4 is based are:

Plaintiffs/Debtors:

1. Paul Bushard and 42 other individual creditors (the "Class 4A Creditors"); and
2. The Lindsay entities; and

Defendants/Creditors:

Beneficial.

B. Synopsis of the Appeals

In appeal number 1, the Lindsay entities appeal, and Beneficial defends, the Bankruptcy Court's grant of partial summary judgment in favor of Beneficial.

In appeals numbers 2 and 3, the Lindsay entities and Beneficial cross-appeal the Bankruptcy Court's final judgment after trial, awarding damages to the Lindsay entities.

In appeal number 4, the so-called Class 4A Creditors together with the Lindsay entities appeal the Bankruptcy Court's dismissal of their complaint.

II

FACTUAL FINDINGS & PROCEDURAL BACKGROUND

A. The Underlying Dispute

1. 1982: The IMA Partnerships' Obligation to Beneficial

At the heart of the dispute underlying all four of these appeals is a 1982 financing contract to which Beneficial, the two IMA partnerships and John Lindsay were parties. Pursuant to this contract, Beneficial loaned the IMA partnerships $1.4 million toward the purchase of Greenway Plaza Apartments ("Greenway"), a 112 unit apartment complex in Austin, Texas. Beneficial secured its loan with a first deed of trust on Greenway and with Lindsay's agreement to guarantee the IMAs' repayment obligation. Lindsay Enterprises, Inc. ("LEI"), the remaining plaintiff, was the sole general partner in each of the two IMA partnerships.

In October of 1982, shortly after acquiring the Greenway property, the IMA partnerships sold it to the Greenway Plaza Investment Company ("GPI"). GPI financed its purchase, at least in part, with a $2.1 million "wraparound" promissory note which it executed in favor of the IMAs. The IMAs secured this obligation with a deed of trust on Greenway which was subordinate to the deed of trust held by Beneficial.

As a result, Greenway was subject to 2 deeds of trust: first, the primary deed securing Beneficial's $1.4 million loan to the IMAs; and second, the subordinate deed securing the IMAs' $2.1 million loan to GPI. Thus, GPI owed the IMAs, which in turn owed Beneficial.

2. 1982-83: The Lindsay Entities' Alleged Merger

The Lindsay entities allege, and Beneficial disputes, that during 1982 and 1983, shortly after GPI's purchase of Greenway, LEI and the IMA partnerships merged. *See* Plaintiff's Opposition to Defendant's Motion for Summary Judgment ("Opposition") at p. 7. In support of this allegation, Mr. Lindsay declares that during that period of time:

> Lindsay Enterprises, Inc. [*LEI, the sole general partner in each of the plaintiff IMA partnerships*] *acquired all of the interests of the other partners in the plaintiff IMAs* and began to deal with this $2,100,000 all-inclusive trust deed [the note payable by GPI to the plaintiff IMAs] as its sole property, principally borrowing approximately $535,000 against that trust deed from another group of my investors and giving to those investors security interests in that trust deed.

Declaration of John R. Lindsay, dated February 29, 1988, filed in Opposition to Defendants' Motion for Summary Judgment ("Lindsay Declaration") at 3 (emphasis added).

3. Early 1985: IMA's Default, GPI's Bankruptcy and the Automatic Stay

While the parties to this litigation dispute which of the Lindsay entities – the IMA partnerships or LEI – owned the note on the wrap-around deed ("wrap-around note") after 1983, they do not dispute that through January 1985 both GPI and the Lindsay entities met their obligations under the Greenway purchase and resale finance agreements.[2]

Then beginning in February 1985 the payments to Beneficial ceased,[3] and on March 25, 1985 GPI filed a voluntary chapter 11 petition in the Bankruptcy Court for the Northern District of Texas, Fort Worth Division.

GPI's filing triggered the Bankruptcy Code's automatic stay provision, 11 USC § 362(a) (automatic ban on sales outside of the ordinary course of business), which operated to prevent both Beneficial and whichever of the Lindsay entities held the wrap-around note from enforcing their secured claims on Greenway. Thus for so long as the statutory stay remained in full effect, neither party could foreclose on Greenway.

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[2] Although the matter does not appear to be material to these appeals, Beneficial takes pains to advise the court of the parties, slightly unusual debt repayment practice. Ordinarily, the holders of a wrap-around note (such as the IMA partnerships) first receive payment from their obligor (GPI) and then remits their obligation to their obligee (Beneficial). Instead of doing this, however, the parties engaged in a course of dealing whereby GPI made monthly payments both to the IMA partnerships and to Beneficial, and the IMA partnerships made no payments at all. The payments received by Beneficial equalled the monthly amount owed to it by the IMAs, and the payments received by IMAs equalled the difference between this amount and the monthly amount owed to the IMAs by GPI. In essence, then, GPI undertook to pay (and did pay) the IMAs' monthly obligation to Beneficial.

[3] GPI stopped paying the IMA partnerships' monthly obligation to Beneficial, and the IMAs did not undertake to resume payments on that obligation. *See* above n.l.

4. Mid 1985: Communications Between the Parties Pending the GPI Stay

Accordingly on May 7, 1985 Beneficial filed with the Texas bankruptcy court a motion to modify the statutory stay. Counsel for the Lindsay entities, Russell Munsch, learned of the motion and, therefore, discussed it with counsel for Beneficial, Charles Gibbs of Dallas' Jenkens & Gilchrist. Munsch declares:

> . . . I requested and received assurances and promises from counsel for Beneficial that before Beneficial would obtain further modifications to the automatic stay to permit any foreclosure proceedings, counsel for Beneficial would provide me with adequate notice so that I could protect my client's interests. Counsel for Beneficial promised and assured me that [adequate] notice would be provided to me before any further efforts would be made to further modify the automatic stay and to proceed with foreclosure proceedings. Based on these representations, I felt reasonably assured of receipt of adequate notice before any such action which would enable me to protect my client's interests against such proceedings.

Declaration of Russell L. Munsch, dated March 3, 1988, filed in Opposition to Defendants' Motion for Summary

Judgment ("First Munsch Declaration") at 3.[4] Thereafter, Munsch wrote a letter to Gibbs in which he stated:

> I would appreciate your cooperation in forwarding me a copy of any Agreed Order entered into with the Debtor [GPI] . . . relating to . . . modification of the automatic stay.

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[4] Two further documents in the record set forth with greater specificity the oral communications between counsel. They are the declaration of Russell L. Munsch, dated June 16, 1988 ("Second Munsch Declaration") and the deposition of Russell L. Munsch ("Munsch Deposition"), dated July 26, 1988, both of which were lodged in Support of Plaintiffs' Motion for Reconsideration. As an example, the Second Munsch Declaration recites that:

> I requested that Mr. Gibbs provide me with information and notice of . . . any proposed order lifting the automatic stay . . . or any hearings scheduled on Beneficial's Motion to Modify Stay. Mr. Gibbs agreed to provide me with any of this information and all such notices of any . . . orders or hearing dates.

Second Munsch Declaration at 2.

These documents were not filed with the bankruptcy court until after it ruled on Beneficial's summary judgment motion; however, the record suggests that the recitations contained in these documents were available to the Lindsay entities prior to the bankruptcy court's ruling. Accordingly, the bankruptcy court concluded that plaintiffs had presented "no newly discovered evidence" in support of their motion for reconsideration. On the basis of this finding, the bankruptcy court in the sound exercise of its discretion, denied the motion for reconsideration. *See Keene Corp. v. International Fidelity Ins. Co.*, 561 F.Supp. 656, 665 (1982) (motion for reconsideration may not "be employed as a vehicle to introduce new evidence that could have been adduced during pendency of the summary judgment motion"); *In re Crozier Bros., Inc.*, 60 B.R. 683 (Bkrtcy.S.D. N.Y. 1986) (same).

Letter from Russell L. Munsch to Charles R. Gibbs, dated June 6, 1985. Thereafter, Gibbs replied:

> As soon as I have received same, I will send you a copy of the Agreed Order entered in this case as per your request.

Letter from Gibbs to Munsch, dated June 11, 1985.[5]

5. Mid 1985 – Early 1986: LEI's Bankruptcy

One month later, on July 12, 1985, LEI filed a voluntary chapter 11 petition in the Bankruptcy Court for the Southern District of California.[6]

As with the GPI bankruptcy, the LEI bankruptcy triggered the automatic stay provision of 11 USC § 362(a). Thus no party could foreclose on any of LEI's assets for so long as the statutory stay remained unmodified.

This court declines to set aside the bankruptcy court's conclusion that the subsequently adduced evidence was not "newly discovered" and, further, declines to set aside the bankruptcy court's implicit ruling that the subsequently filed documents are, therefore, inadmissible. Accordingly, the court does not consider there view Second Munsch Declaration and the Munsch Deposition on its review of the bankruptcy court's summary judgment order.

[5] On July 15, 1985 Munsch himself filed a motion to modify the automatic stay on behalf of the Lindsay entities; however, he, declares that he "agreed to similarly stay [that motion] awaiting the outcome of [GPI's] efforts to reorganize itself." Munsch Declaration at 3-4.

[6] On January 29, 1986, Mr. Lindsay himself filed a voluntary chapter 11 petition in the same court.

6. Early 1986: Relief From Stay, Foreclosure and Notice

Beneficial never filed with the Southern District of California bankruptcy court a motion to modify the LEI statutory stay.

On January 8, 1986, six months after LEI's bankruptcy filing, however, Beneficial obtained relief from the GPI automatic stay. Its attorneys did not provide the Lindsay entities' Munsch with the court's order, as the Lindsay entities argue the parties had agreed. Instead, Beneficial scheduled a foreclosure sale on the Greenway property for February 4, 1986.

Thereafter on January 10, 1986, approximately 3 weeks prior to the date for which Beneficial had scheduled the sale, attorney Glenn Koury of Jenkens & Gilchrist (Beneficial's counsel[7]), mailed notice of the sale to an address which IMAs 79-6 and 81-3 (the two partnerships which had purchased and sold Greenway) once had occupied but since had vacated. Lindsay Declaration at 4. Mr. Lindsay declares that at the time that Koury mailed notice to the defunct address, Koury knew the two IMAs' correct address. *See Id.* In support of his declaration, Mr. Lindsay submits a prior letter which Mr. Koury had mailed six months earlier to IMAs 798, 78-1, 77-4 and 76-2 (other Lindsay partnerships not party to this proceeding) at IMAs 79-6's and 81-3's correct (new) address. *See id.*

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[7] Koury appears to have served in two capacities throughout these proceedings: He was counsel to Beneficial, and he also was trustee of Greenway.

In addition according to the Lindsay declaration, Munsch and attorneys from Koury's firm "were in communication almost on a daily basis" throughout the three and a half week period between the January 10 mailing and the February 4 scheduled date of sale. *See id.* at 5. Notwithstanding this daily communication, Munsch declares, the attorneys from Koury's firm never once disclosed either the stay relief or the scheduled foreclosure sale. *See* First Munsch Declaration at 4; Lindsay Declaration at 5.

The foreclosure sale occurred as planned on February 4. Beneficial was the only bidder at the sale, and it successfully bid $1.5 million in order to acquire title to Greenway. Not until two days later, according to the Munsch declaration, did the Lindsay entities receive their first notice of the foreclosure sale.[8]

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[8] The Lindsay entities' counsel, attorney Munsch, declares that he first learned of the Greenway foreclosure on February 6, 1986, when counsel for Greenway informed him orally. First Munsch Declaration at 4. Munsch further declares that thereafter he

> immediately contacted Mr. Gibbs [counsel for Beneficial] regarding the status of Beneficial's Motion to Modify Stay. Mr. Gibbs immediately apologized . . . Although Mr. Gibbs recalled and acknowledged his agreement to provide me with notice of this Agreed Order and the hearing on same, he admitted that he had failed to provide this information and/or notice.

Second Munsch Declaration at 3. *See also* Munsch Deposition at 72.

Munsch's preparedness to attest to Gibbs' acknowledgement of the alleged agreement would certainly be probative at trial. Likewise, Gibbs' own testimony in this regard would be

7. Mid 1986: The IMA Bankruptcies

Thereafter on July 2, 1986, five months after the foreclosure, the two plaintiff IMA partnerships filed voluntary chapter 11 petitions in the Southern District of California.

Then on August 30, 1986, the Bankruptcy Court confirmed a Joint Plan of Reorganization whereby it merged all 4 of the plaintiff entities and their assets (as well as several entities not party to this suit) into LEI.

B. The Litigation

1. Summary Judgment: The Basis for Appeal Number 1

On April 18, 1986 the LEI entities filed a complaint, which they then amended on September 29, 1986. The amended complaint alleged 7 causes of action against Beneficial:

1. Violation of automatic stay;
2. Fraudulent transfer;
3. Declaratory relief;
4. Breach of contract;
5. Breach of contract – promissory estoppel;

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probative. At the summary judgment stage of this case, however, any such post-notice communications between Munsch and Gibbs were not properly before the bankruptcy court and, therefore, need not have been considered. *See* above n.4.

6. Fraud and deceit; and

7. Negligent misrepresentation.

On March 22, 1988, the Bankruptcy Court entered an order granting Beneficial's motion for summary judgment as to claim 1 and claims 4-7; granting the motion as to claim 2 only as against LEI and Lindsay, but not as against the IMA partnerships; and denying the motion as to claim 3.[9]

On July 20, 1989, plaintiffs appealed the Bankruptcy Court's orders granting partial summary judgment and imposing sanctions.[10] Beneficial moved to dismiss the summary judgment appeal as untimely and the sanctions appeal as premature absent leave of the bankruptcy court. On February 2, 1990 this court denied the motion to dismiss the summary judgment appeal and granted the motion to dismiss the sanctions appeal.

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[9] On June 17, 1988 the bankruptcy court filed its Amended Order Granting in Part Defendant's Motion for Summary Adjudication. (Because for the purpose of this review the amended order does not differ substantially from the original order, for convenience's sake this order simply refers to both interchangeably.)

Plaintiffs thereafter filed a motion for reconsideration, which the Bankruptcy Court on December 2, 1988 denied. In addition on July 11, 1989, the Bankruptcy Court found that the motion for reconsideration was frivolous and, therefore, imposed a sanction of $2,315.

[10] *See* above n.9.

2. Judgment after Trial: The Basis for Appeals Numbers 2 & 3

In July and August of 1988, the Bankruptcy Court tried the remaining causes of action: claims numbers 2 and 3. It granted Beneficial a directed verdict on the third cause of action (declaratory relief) and held Beneficial liable on the second cause of action (fraudulent transfer). *Lindsay v Beneficial Reinsurance Co.,* 98 Bankr. 983 (Bankr. S.D. Cal. 1989) (judgment entered on September 8, 1989). Thereafter both the Lindsay entities and Beneficial timely appealed.

3. Dismissal of the Bushard Claim: The basis for Appeal Number 4

Finally, on December 19, 1989, the bankruptcy court dismissed a related action which on February 2, 1988 had been brought against Beneficial by 46 individuals whose investments in the Lindsay entities had been secured by the wrap-around note which is at the heart of this litigation. Those parties timely appealed, too.

III

JURISDICTION & STANDARD OF REVIEW

A. Jurisdiction

The Bankruptcy Code grants "the district court for the judicial district in which [a] bankruptcy judge is serving . . . jurisdiction to hear appeals from [the bankruptcy judge's] final judgments." 28 USC § 158. Therefore, since Judge Malugen, who entered the final orders of summary judgment, judgment and dismissal which are disputed in this case, serves in the Southern District, this court has jurisdiction to hear the present appeals.

B. Standard of Review

A bankruptcy court's final orders are reviewed *de novo, In Re New England Fish Co.,* 749 F.2d 1277, 1280 (9th Cir. 1984) (citations omitted) (emphasis added) (Ninth Circuit review of bankruptcy court's summary judgment order); however, its "[f]indings of fact . . . shall not be set aside unless clearly erroneous." Fed. R. Bankr. 8013.

IV

CONCLUSION OF LAW

A. The Burden of Proof, Standard of Review and Question Presented

1. The Burden of Proof at Summary Judgment

The burden imposed on the moving party at the summary judgment stage of litigation is minimal: It need only *allege* that a nonmoving party will be unable at trial to establish one or more specified elements necessary to its proof. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-327 (1986).

Then in order to rebut this showing the non-moving party must shoulder a slightly heavier burden: It must present the court with affidavits, depositions, answers to interrogatories, or admissions sufficient to place the challenged element(s) genuinely in dispute. *See id.*

Thereafter the court in considering the motion must accept the non-moving party's evidence as true and must draw from that evidence "all justifiable inferences . . . in the [non-moving party's] favor." *Anderson v. Liberty Lobby, Inc.*, 477 US 242, 255 (1986). Thus in order properly to have withstood Beneficial's motion for summary judgment as to any claim, the Lindsay entities would have to have provided the bankruptcy court with affidavits, depositions, answers to interrogatories, or admissions which, when interpreted in the light most favorable to the Lindsay entities, would render genuinely in dispute all of that claim's elements which Beneficial had alleged could not be proved.

2. The Standard of Review on Appeal of Summary Judgment

As a result of the foregoing discussion, it should be clear that when a court makes so-called findings of "facts" at the summary judgment stage of litigation, it is not engaged in the same kind of truth-seeking endeavor in which it engages at trial. Instead the court is engaged in what might more appropriately be called a "dispute-seeking" endeavor in which it asks: Has the non-moving party adduced evidence sufficient to render the challenged element(s) of its required proof at least arguable?

In assessing the arguability of the challenged claim, the court is drawing a conclusion of law rather than a finding a fact. After all, the court is not concluding that "X" is substantively true or false. Rather it is merely concluding that "X" is material and procedurally in dispute and that, therefore, its truth or falsity is properly triable. As the text of Rule 56 states, summary judgment is proper only where there appears to be "no genuine issue as to any material fact [such] that the moving party is entitled to judgment *as a matter of law.*" Fed. R. Civ. P. 56(c) (emphasis added).

Since a court's findings at the summary judgment stage are conclusions of law rather than findings of fact, they are properly reviewed under the *de novo* standard articulated in *In Re New England Fish Co.*, 749 F.2d 1277, 1280 (9th Cir. 1984) (appeal of bankruptcy court's final order), rather than the "clearly erroneous" standard of Rule 8013 (applicable to findings of fact). In other words, the reviewing court must apply its judgment *independently* of the findings of the bankruptcy court.

3. The Question Presented

Accordingly, the question with which this court is presented as to each cause of action which was summarily adjudicated in Beneficial's favor is: Did the Lindsay entities adduce evidence sufficient, if believed, to render the challenged element(s) of its required proof at least arguable?

B. The Summarily Adjudicated Causes of Action

1. Violation of automatic stay

The Lindsay entities plead that Beneficial's foreclosure on Greenway violated the automatic stay which was triggered by LEI's filing for bankruptcy seven months prior to the foreclosure. That stay by its statutory terms forbids:

> 3. any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
>
> 4. any act to create, perfect, or enforce any lien against property of the estate; and
>
> 5. any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title.

11 USC § 362(a)(3-5) (Bankruptcy Code). The Lindsay entities argue that it was not enough for Beneficial to obtain relief from just the GPI stay; foreclosure also required relief from the subsequent LEI stay.

In order for the Lindsay entities to prevail, they would have to convince the finder of fact by a preponderance of the evidence that LEI owned Greenway on February 4, 1986 – the date on which Beneficial foreclosed.[11] In order to prove LEI's ownership, the Lindsay entities would have to prove that LEI acquired the IMAs' interest in Greenway prior to that date. The Lindsay entities' ability to prove this acquisition and their sincerity in attempting to prove it are precisely what Beneficial's motion challenges.[12]

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[11] GPI filed for bankruptcy on March 25, 1985; LEI filed for bankruptcy on July 12, 1985; Beneficial foreclosed on February 4, 1986; and the IMA partnerships filed for bankruptcy on July 2, 1986. Since a § 362 stay operates only prospectively, and since the IMA stays were not triggered until *after* the foreclosure, the only stays on which the Lindsay entities could rely were the GPI and LEI stays, which were triggered prior to the foreclosure. The GPI's stay having been modified, however, the Lindsay entities' only basis on which to establish a violation-of-stay claim is the LEI stay. Thus, in order for the foreclosure on

The Lindsay entities meet the challenge primarily with Mr. Lindsay's declaration that during 1982 and 1983 LEI

> acquired all of the interests of the other partners in the plaintiff IMAs and began to deal with th[e] $2,100,000 all-inclusive trust deed as its sole property . . . "

Lindsay Declaration at 3.

In reply to the Lindsay entities' showing, Beneficial argues that Mr. Lindsay's declaration is the only evidence, and insufficient evidence, of the IMAs' merger into LEI. It further argues that the Lindsay entities should be estopped from claiming such a merger because

> a. They never availed themselves of California's statutorily prescribed mechanism for providing notice of a merger of interests;[13]

Greenway to have violated the LEI stay, LEI must have owned the wrap-around note at the time of foreclosure.

[12] *See* Appellee's (Beneficial's) merger Opposition Brief at 13 ("the issue is whether there was a 'merger' of interests [between LEI and the IMAs]. Plaintiffs can show no proof of this purported 'merger,' and are estopped from claiming such a merger").

[13] Beneficial cites California Corporations Code § 15525(2) and (5) (West 1977) as the statute governing notice of the amendment or cancellation of a certificate.

b. The IMAs' independent filing for bankruptcy 5 months after the foreclosure disproves the Lindsay entities' representation that the IMAs had, by merger, ceased to exist prior to the foreclosure; and

c. The IMAs' inclusion of the wrap-around note as an asset in the bankruptcy schedules which they filed 5 months after the foreclosure disproves the Lindsay entities' representation that LEI, rather than the IMAs, owned the note at the time of foreclosure.

Stacked up against the declaration of Mr. Lindsay, these representations and arguments appear potent; however, they reflect only on the weight, rather than the sufficiency, of that declaration. Accordingly, they are not adequate to sustain a grant of summary judgment.

As the Supreme Court has emphatically held,

> [c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ruling on a motion for summary judgment . . . The evidence of the non-movant is to be believed.

Anderson v. Liberty Lobby, 477 US 242 at 255 (1986). Here, believing per *Anderson* the evidence declared by Mr. Lindsay, the court cannot rule other than that the ownership of the wrap-around note is material and is genuinely in dispute. Thus with respect to the Lindsay entities' first cause of action, Beneficial *is not* entitled to judgment as a matter of law.

2. Fraudulent transfer

No party has appealed the bankruptcy court's ruling as to this claim granting summary judgment against plaintiffs LEI and Lindsay and denying it against the plaintiff IMAs.

3. Declaratory relief

No party has appealed the bankruptcy court's denial of summary judgment as to this claim.

4. Breach of contract

The Lindsay entities plead that Beneficial in mid-1985 entered into, and then in early 1986 breached, a contract whereby Beneficial promised to notify the Lindsay entities before taking any further action regarding Greenway. In order to prevail at trial on a cause of action for breach of contract, the Lindsay entities would have to establish that:

a. They and Beneficial had entered into an agreement which satisfied the traditional elements of a contract: (i) mutual assent (offer and acceptance), (ii) consideration and (iii) compliance with the statute of frauds;

b. They performed their obligations under the agreement (or had a valid excuse for nonperformance);

c. Beneficial breached that agreement; and

d. The breach damaged the Lindsay entities.

In its motion for summary judgment, Beneficial challenged the Lindsay entities' ability to prove contract formation – that is, mutual assent and consideration. Accordingly per Supreme Court precedent, in order to survive summary judgment the Lindsay entities had to adduce evidence sufficient, if believed, to justify an inference of mutual assent and consideration.

In support of the element of mutual assent, the Lindsay entities adduced the declaration of Russell Munsch:

> . . . I requested and received assurances and promises from counsel for Beneficial . . . Counsel for Beneficial promised and assured me . . . Based on these representations, I felt reasonably assured . . .

While Munsch's declaration may not recite who was offeror and who was offeree, nevertheless if true it surely indicates the existence of mutual assent. *Cf. Southwestern Investment Co. v. Alvarez*, 442 S.W.2d 862, 869 (1969) (oral agreement may be proved by circumstantial evidence), reh'g den.

In support of the element of consideration, the Lindsay entities adduced the agreed fact that they did not perfect other statutorily available means with which to guarantee that they would receive notice. They argue that this failure to safeguard their notice rights in a manner other than by the alleged, agreement between counsel constituted a forbearance to act upon a legal right. They further argue that this forbearance occurred in reliance on the assurances of opposing counsel. These arguments are entirely plausible. Moreover, since forbearance in the exercise of a legal right is sufficient consideration for a contract, *Kennard v. McCray*, 648 S.W.2d 743, 745-746 (1983), reh'g den., the Lindsay entities' forbearance is sufficient to constitute consideration in this case.

The bankruptcy court found and held that

> [t]here was no offer, no acceptance, no consideration and no contract for the alleged agreements . . .

Moreover, it held that any reliance by the Lindsay entities on the alleged agreement would have been unreasonable in light of the statutory notice safeguards available to the Lindsay entities.

To hold as the bankruptcy court did, however, was error. This court and the bankruptcy court have not heard evidence sufficient to conclude that a valid contract either did or did not exist. We have heard sufficient evidence, however, to place the elements of the alleged contract in dispute. For this reason, Beneficial is not entitled to summary judgment as a matter of law on the Lindsay entities' cause of action for breach of contract.

5-7. Promissory estoppel, Fraud and deceit and Negligent misrepresention

The Lindsay entities further pled three contract-related causes of action, all of which arise from the unfulfilled agreement which Mr. Munsch declares that Beneficial's counsel made to him. As previously noted, *see* above p.8, the bankruptcy court held both (1) that there was no contract between the parties[14] and (2) that any reliance by the Lindsay entities on an alleged agreement was unreasonable. This Court's having already concluded, however, that the evidence underlying both of these holdings was materially in dispute had, therefore, not properly disposable on a motion for summary judgment, the court further concludes that Beneficial is not entitled to summary judgment as a matter of law on the Lindsay entities' three contract-related causes of action.

V.

CONCLUSION

For the foregoing reasons, **IT IS ORDERED** that the bankruptcy court's summary adjudication of the Lindsay entities' first, fourth, fifth, sixth and seventh causes of actions is reversed, and the causes of action are remanded for further proceedings.

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[14] The bankruptcy court held that the oral communications between counsel together with the follow-up correspondence constituted a mere request by the Lindsay entities' counsel that Beneficial's counsel send along a courtesy copy of a court order. The bankruptcy court further held that "[t]here was no contract to not take any other action." The language of the order suggests that the court was recognizing the non-existence of an agreement or contract by which Beneficial would have been required to refrain from seeking relief from the GPI stay; however, such does not appear to have been the nature of the contract alleged by the Lindsay entities. Rather than allege a contract to refrain from seeking relief from the automatic stay, the Lindsay entities alleged a contract to provide *notice* in the event that relief was obtained. *See, e.g.,* First Amended Complaint, at pp. 10-14. In any event, notwithstanding its characterization of the alleged contract, the bankruptcy's court's order generated the same result: summary adjudication of the Lindsay entities' cause of action for breach of contract.

1-8-92
date

/s/ Gordon Thompson, Jr.
GORDON THOMPSON, JR.
United States District Judge

cc: All counsel

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JOHN R. LINDSAY, Debtor

JUDGMENT IN A CIVIL CASE

V.

Beneficial Reinsurance Co., et al

CASE NUMBER: 89-1270 GT (BTM)

(Filed Jan. 17, 1992)

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the bankruptcy court's summary adjudication of the Lindsay entities' first, fourth, fifth, sixth and seventh causes of actions is reversed, and the causes of action are remanded for further proceedings.

1/17/92
Date

DON HENDRIX
Clerk

/s/ Nancy Coblay
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re JOHN R. LINDSAY, Debtor. Related Bankruptcy Cases Nos. 86-00748-LM11; 85-03241-LM11; 86-04210-LM11; 86-04209-LM11.	Civ. No. 89-1536 **MEMORANDUM DECISION AND ORDER**[1] (Filed Jan. 9, 1992)
JOHN LINDSAY, et al., Plaintiffs, v. BENEFICIAL REINSURANCE COMPANY, et al., Defendants.	

Beneficial challenges the bankruptcy court's final judgment setting aside Beneficial's foreclosure sale and awarding the Lindsay entities actual damages. It argues that

A. The Bankruptcy Code does not provide for the setting aside of a foreclosure sale; that even if it does

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[1] This order incorporates, and should be read in conjunction with, this court's orders, issued today, in civil cases numbers 89-1270, 89-1537 and 90-0586.

B. The bankruptcy court's estimation of Greenway's fair market value was erroneous; and that

C. The bankruptcy court should have ordered that Beneficial return the property to the Lindsay entities rather than pay the Lindsay entities actual damages.

For these reasons, Beneficial contends that the judgment below should be reversed.

I

FACTUAL BACKGROUND

The testimony below indicates that Beneficial's February 4, 1986 foreclosure on Greenway occurred on the verge of a volatile real estate market. From late 1985 until the end of the first quarter of 1986, prices in the market for Austin apartment buildings gradually declined. Thereafter, prices declined precipitously. Moreover, the rate of apartment occupancy, which during the first quarter of 1986 had reached its point of saturation, had by the first quarter of 1987 declined to its nadir. As of the date that judgment was entered in this case, the Austin apartment market still had not yet recovered. The Lindsay entities' expert further testified that these trends, although notable in hindsight, could not have been accurately predicted at the time that they occurred.

Notwithstanding the market's volatility, some benchmarks with which to estimate the value of Greenway at the time of the foreclosure sale do exist. First, on January 3, 1986, one month before the foreclosure sale, the Lindsay entities' appraiser estimated Greenway's fair market value at $2.5 million. Second, on January 27, 1987, one year after the foreclosure sale, Beneficial's appraiser estimated Greenway's fair market value at $1.7 million. The bankruptcy court found, however, that this appraisal was based in part on a *hindsight* perspective of the drastic changes which were occurring in the Austin market at the time of the sale.

Third, between the foreclosure sale and the end of 1986, Beneficial received offers to purchase Greenway ranging between $1.1 million and $2.1 million. Of these, Beneficial accepted two: a February 26, 1986 offer of $1.875 million made on February 26, 1986, and an April 24, 1986 offer of $1.95 million. Neither offer resulted in a sale.

The bankruptcy court, considering all of this evidence, ruled after trial (1) that the foreclosure sale should be set aside, (2) that the fair market value of Greenway at the time of the foreclosure sale was $2.5 million and (3) that Beneficial should pay the IMAs damages.

II

CONCLUSIONS OF LAW

A. Whether the Bankruptcy Code permits the setting aside of Beneficial's foreclosure sale

The Bankruptcy Statute provides in pertinent part that a trustee may avoid a transaction if

1. The transaction is a "transfer of an interest of the debtor in property, 11 U.S.C. § 548;

2. "[T]he debtor . . . received less than reasonably equivalent value in exchange for such transfer," 11 U.S.C. § 548(2)(A); and
3. "[T]he debtor . . . became insolvent as the result of such transfer," 11 U.S.C. § 548(2)(B)(i);

See 11 U.S.C. § 548.

Applying these provisions to the facts adduced at trial, the Bankruptcy Court held (1) that the foreclosure sale was a transfer, (2) that Beneficial paid (and the IMA partnerships therefore received) less than reasonably equivalent value in exchange for the transfer and (3) that the transfer rendered the IMA partnerships insolvent. Accordingly, the court granted the trustee's request to set aside the foreclosure sale.[2] Beneficial now challenges each of the findings on which the court based its holding.

1. Characterization of foreclosure sale as a transfer

With respect to the bankruptcy court's first holding, Congress in 1984 made patently clear that foreclosure sales constitute transfers within the meaning of 11 U.S.C. § 548. *See* Bankruptcy Amendments and Federal Judgeship Act (B.A.F.J.A.) of 1984; *In Re Ehring*, 900 F.2d 184, 187 (9th Cir. 1990); *In Re Verna*, 58 B.R. 246 (Bankr. C.D. Cal. 1986).

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[2] Ironically, the trustee who sought to avoid the foreclosure sale was attorney Koury, who, in his other capacity as counsel to Beneficial, presumably would oppose the set aside. The record indicates that trustee Koury's request regarding avoidance of the sale was prompted by a request from the Lindsay entities.

2. Reasonably equivalent value

As for the court's second holding, the relevant authorities – none of which bind this court are at odds. The Ninth Circuit's Bankruptcy Appeal Panel ("B.A.P.") holds that the amount paid at a foreclosure sale is, as a matter of law, the reasonably equivalent value of the property sold. *See In Re Madrid*, 21 Bankr. 424, 427 (1982).[3] The Fifth and Seventh Circuits, by contrast, hold that the amount bid at a foreclosure sale is the reasonably equivalent value of the land *only* if that amount is 70% or more of the property's fair market value. *Durrett v. Washington Nat. Ins. Co.*, 621 F.2d 201, 203 (5th Cir. 1980); *Matter of Bundles*, 856 F.2d 815, 819 (7th Cir. 1988) (same).[4]

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[3] Although the Ninth Circuit affirmed the B.A.P.'s decision, it did so on grounds other than the B.A.P.'s "reasonably equivalent value" holding. *See In Re Madrid*, 725 F.2d 1197, 1199 (9th Cir. 1984). Because the Ninth Circuit declined to address the issue and because opinions of the B.A.P. do not bind this court, *see Bank of Maui v. Estate Analysis, Inc.*, 904 F.2d 470, 472 (9th Cir. 1990), the court finds itself presented with a question of first impression.

[4] The Fifth Circuit in *Durrett* actually held only that the amount paid at a foreclosure sale was not necessarily the reasonably equivalent value of the property sold. In so holding, the court noted that it could identify no prior case in which a court had held 70% or less of a property's fair market value to constitute reasonably equivalent value; however, the court did not incorporate this 70% observation into its holding. Subsequently, courts in other cases cited *Durrett* for the proposition that 70% or more of a property's fair market value constitutes reasonably equivalent value. *See, e.g., Bundles*, 856 F.2d at 819. Hence what has come to be known as the *Durrett* 70% Rule.

The bankruptcy court, electing to follow the Fifth Circuit's approach, ruled that the IMA partnerships received less than reasonably equivalent value at Beneficial's foreclosure sale of Greenway. Beneficial now appeals the court's selection of the approach of the Fifth Circuit over that of the B.A.P. Thus, this court must weight [sic] the relative merits of the two approaches.

a. The B.A.P. Approach

The B.A.P. rule, holding "reasonably equivalent" *as a matter of law* any price paid at a foreclosure sale, promotes both participation in foreclosure sales by buyers and sellers and considerations of efficiency. The rule assures buyers that their purchases are both valid and final, rather than subject to subsequent attack. It benefits creditors, too, insofar as purchasers will be willing to pay more money for titles which are unencumbered by the possibility of subsequent review for insufficient consideration. Finally the B.A.P. rule, like any presumptive rule, is easy to apply since it requires no actual findings as to a property's fair market value.

b. The Fifth and Seventh Circuits' Approach

The Fifth Circuit rule, rejecting any presumption of reasonable equivalence where the price paid is less than 70% of the property's fair market value, focuses on legislative intent and on the interest of the bankrupt estate. The express language of section 548 authorizes the avoidance of foreclosure sales for anything less than reasonable value. For the court to accept the sufficiency of foreclosure bids as a matter of law would be to ignore the statute's express language and, in effect, to usurp Congress' law-making power. This no court should do. *See Matter of Bundles,* 856 F.2d 815, 823 (7th Cir. 1988) ("Any change deemed desirable . . . should be addressed to Congress rather than this court").

Further, to uphold a foreclosure for less than reasonably equivalent value is to deprive the bankrupt estate of its due equity in the property, *Durrett,* 621 F.2d at 203, and thereby, to hinder the debtor's goal of obtaining as much income as possible from its remaining assets. The Fifth Circuit's 70% rule assures debtors of a substantial minimum income from the foreclosure of their assets.

c. This court's approach

This court elects to adhere to the Fifth Circuit's 70% rule because that rule vindicates the interests of all parties. Under that rule, purchasers need only pay 70% of the property's fair market value in order to be assured of valid title. Creditors still receive high payments since purchasers will make such payments in order to assure the validity and finality of title. In addition, the debtor benefits because the 70% rule guarantees a substantial minimum income for the bankrupt estate. Therefore, none of these parties suffers as a result of the court's post-sale review of the adequacy of foreclosure bids.

Finally and most importantly, the 70% rule follows the legislature's intent. When drafting B.A.F.J.A., Congress expressly declined to overrule the Fifth Circuit's reasonably equivalent value holding in *Durrett. See Bundles,* 856 F.2d at 821, n. 8. For this reason and the reasons noted above, the court rejects any rule suggesting that the price paid at a foreclosure sale is presumptively reasonably equivalent value.

3. Post-sale solvency

As for the bankruptcy court's third holding with respect to avoidance of the sale, this court notes that Beneficial never argued at trial that the IMA partnerships were solvent. Moreover, no evidence in the record or arguments before this court controverts the bankruptcy court's conclusion that the sale rendered the IMA partnerships insolvent. Thus under the clearly erroneous standard of review, this court upholds the bankruptcy court's finding that the Greenway foreclosure sale rendered the IMA partnerships insolvent.

B. Whether the Bankruptcy Court Correctly Evaluated the Property's Fair Market Value at $2.5 Million

Beneficial advances three arguments in support of its contention that the bankruptcy court's valuation of Greenway at $2.5 million was clear error. Its arguments are that the bankruptcy court erroneously:

1. Adopted the IMA appraisal while "completely disregard(ing) Beneficial's appraisal report;"
2. Excluded evidence of rejected offers to purchase Greenway which would have reduced the court's estimate of the property's fair market value; and

3. **Failed to consider the pending foreclosure of Greenway in estimating the property's fair market value.**

With respect to Beneficial's first argument, the record indicates that the bankruptcy court did in fact consider Beneficial's appraisal. In its opinion the court discussed in retail both the IMA and Beneficial appraisal reports. The court adopted the IMA report because it was made closer to the time of the foreclosure sale and because it was made before significant downturns in the real estate market occurred. The court found by contrast that the Beneficial report, which was made nearly a year after the foreclosure sale, "was incurably influenced by dramatic [post-sale] changes in the Austin market conditions." Evidently, then, the bankruptcy court did consider Beneficial's appraisal report and did not commit error in adopting IMA's appraisal instead.

Regarding Beneficial's second argument, the bankruptcy court's exclusion of the rejected offers also was not clearly erroneous. The offers subsequent to the foreclosure sale, like the appraisal after the foreclosure sale, were tainted by the "precipitously fallen" Austin market. As a result it would not have been clear error for the bankruptcy court to have excluded those offers as it did.

Finally, with respect to Beneficial's third argument, the bankruptcy court's decision to not consider the distress circumstances of a foreclosure sale in computing Greenway's "fair market value" also was not clearly erroneous. As both parties recognize, the concept of "fair market value" reflects how much money a willing buyer under no compulsion to buy would pay to a willing seller *under no compulsion to sell* in exchange for the property.

Foreclosure implies a compulsion to sell and therefore cannot be computed into the land's fair market value. Therefore, Beneficial again fails to establish that the Bankruptcy Court's valuation of the property is clearly erroneous.

C. Whether the Remedy Chosen by the Bankruptcy Court was Proper

When a transfer is avoided under § 548, a trustee or debtor in possession may recover the property transferred, or, if the court so orders, the value of the transferred property. *In Re General Industries,* 79 B.R. 124, 134-35 (Bankr. Mass. 1987) (citing 11 USC § 550(a)). Ordinarily the transferee should return the property. *Id.* Where return of the property would be inequitable, however, the transferee must pay the property's value. *Id.*

The bankruptcy court considered both of these options in fashioning its remedy. First, the court determined that return of the land would be inequitable: Greenway's value having fallen precipitously from the February 1986 estimate of $2.5 million, the IMA partnerships could not have sold Greenway for a profit at the time of judgment and, therefore, would not have been rendered whole by a return of Greenway.

The court therefore ordered Beneficial to compensate the IMA partnerships for the actual damages sustained by the partnerships at the time of the foreclosure sale. In so doing, the court ordered Beneficial to pay the IMA partnerships the difference between (1) the amount which GPI owed the IMA partnerships and (2) the amount which the IMA partnerships in turn owed Beneficial.[5] Again, the bankruptcy court's choice of remedies is not clearly erroneous and therefore should be affirmed.

II

CONCLUSION

For the foregoing reasons, **IT IS ORDERED** that

1. The Bankruptcy Court's finding that Greenway's fair market value at the time of foreclosure was $2.5 million dollars is **affirmed**;

2. The Bankruptcy Court's order setting aside Beneficial's foreclosure sale under 11 USC § 548 is **affirmed**; and

3. The Bankruptcy Court's judgment awarding the Lindsay entities actual damages rather than ordering a return of the property also is **affirmed.**

1-8-91 /s/ Gordon Thompson, Jr.
date GORDON THOMPSON, JR.
United States District Judge

cc: All counsel

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[5] This calculation of damages appears to be appropriate because the figure representing the largest conceivable amount of the IMA partnerships' damages is less than the $2.5 million fair market valuation. After all, if the IMA partnerships (1) had already paid the entire $1.4 million which they owed to Beneficial and (2) had not yet received any of the $2.1 million owed to them by GPI, then the IMA partnerships would be entitled to $2.1 million, a figure $400,000 below Greenway's fair market value.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JOHN LINDSAY

JUDGMENT IN A CIVIL CASE

V.

BENEFICIAL REINSURANCE COMPANY, et al.,
CASE NUMBER: 89-1536

(Filed Jan. 16, 1992)

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[XX] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED the Bankruptcy Court's finding that Greenway's fair market value at the time of foreclosure was $2.5 million dollars is affirmed. The Bankruptcy Court's order setting aside Beneficial's foreclosure sale under 11 USC 548 is affirmed. The Bankruptcy Court's judgment awarding the Lindsay entities actual damages rather than ordering a return of the property also is affirmed.

JAN 16 1992
Date

DON HENDRIX
Clerk

(SEAL)

KATHYRN D. MIKLASKI
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re

JOHN R. LINDSAY,

Debtor.

Related Bankruptcy Cases Nos.
86-00748-LM11; 85-03241-LM11;
86-04210-LM11; 86-04209-LM11.

JOHN LINDSAY, et al.,

Plaintiffs,

v.

BENEFICIAL REINSURANCE
COMPANY, et al.,

Defendants.

Civ. No. 89-1537

MEMORANDUM DECISION AND ORDER[1]

(Filed
Jan. 9, 1992)

The Lindsay entities challenge two further rulings of the bankruptcy court. First, they challenge the bankruptcy court's August 1988 directed verdict on the Lindsay entities' second cause of action – for fraudulent transfer. That verdict was entered in favor of Beneficial and constituted the bankruptcy court's judgment that Beneficial had provided sufficient notice of the foreclosure sale under Texas law. Second, the Lindsay entities challenge the bankruptcy court's December 30, 1988 order denying their motion to reopen the case for further discovery.

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[1] This order incorporates, and should be read in conjunction with, this court's orders, issued today, in civil cases numbers 89-1270, 89-1536 and 90-0586.

I

CONCLUSIONS OF LAW

A. Sufficiency of Notice Under Texas Law

This court reviews de novo the adequacy of Beneficial's notice under Texas law. *See In re Dominelli,* 820 F.2d 313 (9th Cir. 1987); *Ragsdale v. Haller,* 780 F.2d 794 (9th Cir. 1986). According to that law, a foreclosing party is required to serve notice "at the most recent address as shown by [the foreclosing party's] records." Tex. Rev. Civ. Stat. Ann. 3810 (Vernon Supp. 1982). Thus in order to have complied with Texas notice law, Beneficial would have to have mailed notice to the most recent IMA address as shown by Beneficial's records.

Under Texas law, information which is known to an attorney but not known to his client is properly imputed to the client. *See Carter v. Converse,* 550 S.W.2d 322, 329 (Tex. Civ. App. 1977); *Kemp v. Harrison,* 431 S.W.2d 900, 904 (Tex. Civ. App. 1968). Accordingly, if Beneficial's attorney knew the IMAs, then-current address when Beneficial mailed notice to the IMAs at their then-defunct address, then the attorney's knowledge would properly be imputable to Beneficial, and as a result Beneficial's service of notice would not be in compliance with the Texas notice law.[2]

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[2] One individual – Glenn Koury of Dallas' Jenkens & Gilchrist – served both as counsel to Beneficial and as trustee of

Here, the evidence does not indicate that Beneficial possessed in its records an address for the two plaintiff IMAs which was any more recent than the then-defunct address to which Beneficial mailed notice. The evidence does indicate, however, that Beneficial's attorney, Glenn Koury of Dallas' Jenkens & Gilchrist, had previously corresponded with *other* IMAs at the then-current address of the two plaintiff IMAs. Whether all of the IMAs maintained one collective address and whether Koury would know this is not clear from the record.

Thus, the court is inclined to remand this case for a finding as to whether Koury's knowledge of the other IMAs' address constituted knowledge of the plaintiff IMAs' address. If it did, then the bankruptcy court should find that Beneficial's notice was insufficient.

B. The Bankruptcy Court's Refusal to Reopen the Case

As for the Lindsay entities' second challenge in this appeal, a motion to reopen a case in order to introduce further evidence requires that the moving party show by affidavit

> [1] what [it] expects to prove, [2] the character of the evidence proposed to be introduced, [3]

Greenway. The Bankruptcy Court erroneously concentrated on Koury's role as trustee of Greenway, rather than on his role as attorney for Beneficial. So doing, it relied on Texas law holding that knowledge held by a trustee is not imputed to the holder of a debt, *see In re Lindsay*, 98 Bankr. 983, 991-992 (S.D. Cal. 1989) (citing *Dillar v. Broyles*, 633 S.W.2d 636 (Tex. Civ. App. 1982)), and therefore found that Koury's knowledge of the IMAs' new address should not be imputed to Beneficial.

> the diligence exercised to introduce the evidence at trial, and [4] the reasons justifying the failure to offer it at that time.

Westerholm v. 20th Century Ins. Co., 58 Cal. App. 3d 628, 634 (1976). The trial court's decision not to reopen a case upon a defective showing should not be disturbed on appeal absent a clear abuse of discretion. *Id.* at 634-635.

In the present case, no evidence indicates that LEI ever provided the trial court with the required affidavit. Moreover even now, the Lindsay entities make no showing to justify their failure to raise the discovery issue before trial (the fourth prong of the *Westerholm* test). Therefore, the bankruptcy court did not abuse its discretion in denying the motion to reopen the case, and its decision consequently is affirmed.

II

CONCLUSION

For the foregoing reasons, **IT IS ORDERED** that

1. This case is **remanded** for a finding as to whether Beneficial's imputed knowledge of *other* IMAs' address constituted knowledge of the plaintiff IMAs' address, thereby rendering Beneficial's notice of the foreclosure sale insufficient under Texas law; and

2. The bankruptcy court's order denying the Lindsay entities' motion to reopen the case for further discovery is **affirmed.**

1-8-92
date

/s/ Gordon Thompson, Jr.
GORDON THOMPSON, JR.
United States District Judge

cc: All counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re

JOHN R. LINDSAY,

Debtor.

Related Bankruptcy Cases
Nos. 86-00748-LM11;
85-03241-LM11; 86-04210-LM11;
86-04209-LM11.

PAUL J. BUSHARD, et al.,

Plaintiffs,

v.

BENEFICIAL REINSURANCE
COMPANY, et al.,

Defendants.

Civ. No. 90-0586

**MEMORANDUM
DECISION
AND ORDER**[1]

(Filed Jan. 9, 1992)

The Bushard plaintiffs appeal the bankruptcy court's order dismissing their complaint with prejudice.

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[1] This order incorporates, and should be read in conjunction with, this court's orders, issued today, in civil cases numbers 89-1270, 89-1536 and 89-1537.

I

FACTUAL BACKGROUND

Prior to any of the Lindsay entities' bankruptcies, Paul J. Bushard and 45 other investors (the "Bushard plaintiffs" or "class 4A creditors[2]") loaned $540,110.96 to LEI. The investors secured their loan with a security interest in the $2.1 million wrap-around note on the trust deed in Greenway.[3] LEI later declared bankruptcy.

On February 2, 1988, the Bushard plaintiffs filed a complaint for damages arising from Beneficial's foreclosure sale on Greenway. Because the complaint was essentially identical to the Lindsay complaint, Beneficial moved to dismiss it pursuant (A) to Rule 12(b)(6) of the Federal Rules of Civil Procedure and (B) to the doctrine of res judicata. The Bankruptcy Court continued Beneficial's dismissal motion in order to allow the Bushard plaintiffs sufficient time to protect their interests by seeking modification of the Joint Plan of Reorganization for Lindsay (JPRL). The Bushard plaintiffs, however, decided to file a motion to consolidate instead.

Thereafter on December 19, 1989 the bankruptcy court dismissed the Bushard complaint for failing to state a claim upon which relief could be granted and refused to hear the motion to consolidate.[4] The Bushard plaintiffs timely appealed, contending that rather than dismiss their complaint, the court should have consolidated it with the Lindsay complaint.

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[2] Under the Joint Plan of Reorganization for Lindsay (JPRL), the 46 investors were classified as Class 4A creditors of the Lindsay estates. This class comprised "all claimants holding debt instruments secured by the debtor's interests in Greenway Plaza."

[3] LEI did not use the loan to purchase Greenway. LEI simply secured the loan with their pre-existing interest in the Greenway property.

II

CONCLUSIONS OF LAW

A. The motion to dismiss

This court reviews de novo the lower court's dismissal. *Fort Vancouver Plywood Co. v. U.S.*, 747 F.2d 547, 552 (9th Cir. 1984).

The Bushard plaintiffs are collaterally estopped from filing a complaint against Beneficial under the doctrine of res judicata. According to the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving (1) the same parties *or their privies* (2) based on the same cause of action. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n. 5 (1979). The Bushard complaint satisfies both conditions: First, as members of Class 4A of the Lindsay estate and as successors-in-interest to title in Greenway, the Bushard plaintiffs were in privity with the Lindsay plaintiffs at the time they filed suit. Second, both the Lindsay and Bushard complaints arose out of the same cause of action – namely, Beneficial's foreclosure sale of Greenway. Thus, under the doctrine of res judicata the Bushard plaintiffs are collaterally estopped from filing suit on actions already litigated by the Lindsay plaintiffs. Where, as here, the doctrine of res judicata bars plaintiffs' action, it consequently bars their obtaining relief.

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[4] The transcript from the motion to dismiss indicates that the judge would not allow "the new plaintiffs to bring suit against Beneficial on exactly the same matter which was tried before this Court." Therefore, the Bushard complaint was dismissed.

B. The motion to consolidate

The bankruptcy court's having properly dismissed the Bushard complaint, the Bushard plaintiffs' request that their case be consolidated with the Lindsay case is rendered moot. This court, therefore, need not render an opinion.

III

CONCLUSION

For the foregoing reasons, **IT IS ORDERED** that

1. The bankruptcy court's dismissal of plaintiffs' claim is **affirmed**; and

2. The bankruptcy court's denial of the Bushard plaintiffs' request to consolidate also is **affirmed.**

date 1-8-92.
cc: All counsel

/s/ Gordon Thompson, Jr.
GORDON THOMPSON, JR.
United States District Judge

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JOHN R. LINDSAY

JUDGMENT IN A CIVIL CASE

V.

BENEFICIAL REINSURANCE COMPANY, et al.,

CASE NUMBER: 90-586

(Filed Jan. 16, 1992)

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED the Bankruptcy Court's dismissal of plaintiffs' claim is affirmed. The Bankruptcy Court's denial of the Bushard plaintiffs' request to consolidate is also affirmed.

JAN 16 1992
Date

(SEAL) DON HENDRIX
Clerk

KATHYRN D. MIKLASKI
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re

JOHN R. LINDSAY,

Debtor.

No. 86-00478-LM11

In re

LINDSAY ENTERPRISES, INC.,
a California corporation,

Debtor.

No. 85-03241-LM11

In re

IMA 79-6,
a California limited partnership,

Debtor.

No. 86-04210-LM11

In re

IMA 81-3,
a California limited partnership,

Debtor.

No. 86-04209-LM11

USDC #
C89-1270-GT

ADV # C86-0279-
LM11
APPEAL NO. 1

MEMORANDUM
DECISION
AND ORDER

(Filed
Feb. 2, 1990)

JOHN R. LINDSAY, et al.,
Appellants,
v.
BENEFICIAL REINSURANCE COMPANY, a corporation; BENEFICIAL STANDARD LIFE INSURANCE COMPANY, a corporation; et al.,
Appellees.

Appellees BENEFICIAL REINSURANCE COMPANY and BENEFICIAL STANDARD LIFE INSURANCE COMPANY have brought this motion to dismiss the first of three appeals from the bankruptcy court's rulings in the above-captioned related cases on the grounds that the appeal is untimely and procedurally defective. Having fully considered the papers submitted in support of and in opposition to the motion, the court finds that oral argument is not necessary and rules as follows.

BACKGROUND

On June 6, 1988 the bankruptcy court entered an order granting partial summary judgment in favor of appellees as to six of appellants' causes of action. The order contains a clause stating, "There is no just reason for delaying entry of this judgment as to those causes of action for which summary judgment is granted, and judgment shall so be entered." The order further provides "that this Order shall be entered as judgment" as to the claims summarily adjudicated. On June 22, 1988 the court entered an amended order which corrected an omission in the original order. The amended order contains the same provisions as the original order regarding entry of judgment.

On December 2, 1988 the bankruptcy court entered an order denying appellants' motion for reconsideration of its ruling on the summary judgment motion. In its order, the court declared that it would take under consideration, pending the outcome of trial, appellees' request for sanctions due to the allegedly frivolous motion for reconsideration. In a letter dated April 18, 1989 the court notified the parties that it found the motion for reconsideration frivolous and sanctionable under Bankruptcy Rule 9011. The letter requested counsel for appellees to submit a bill of costs and gave appellants an opportunity to file an opposition to the costs claimed. On July 11, 1989 the court entered its order granting the request for sanctions in the amount of $2,315.

Appellants JOHN R. LINDSAY, LINDSAY ENTERPRISES, INC. ("LEI"), IMA 79-6, and IMA 81-3 filed a notice of appeal to the district court on July 20, 1989. Appellants seek review of the following: the bankruptcy court's June 6, 1988 order granting partial summary judgment; the June 22, 1988 amended order; the December 2, 1988 order denying appellants' motion for reconsideration; the April 18, 1989 letter informing the parties that the court found the motion for reconsideration sanctionable; and the July 11, 1989 order granting sanctions. Appellees have moved for dismissal of the appeal on the grounds that the notice of appeal was untimely as to the summary judgment orders, the April 18, 1989 letter is not an appealable order, and appellants never obtained certification to appeal the sanctions order. Appellees also have requested that sanctions be imposed on appellants for frivolously filing an untimely appeal.

DISCUSSION

A. Timeliness of the Appeal of Partial Summary Judgment

The notice of appeal from a bankruptcy court decision must be filed with the clerk of the bankruptcy court "within 10 days of the date of entry of the judgment, order, or decree appealed from." Bankruptcy Rule 8002(a). The ten-day period is subject to extension should a timely motion be made to alter or amend the judgment, in which case the time for appeal begins to run from the entry of the order granting or denying such motion. Bankruptcy Rule 8002(b). The period may also be extended for an additional twenty days upon request to the bankruptcy court so long as the request is made prior to the expiration of the ten-day period or, in the case of excusable neglect, prior to the expiration of twenty days from the running of the ten-day period. Bankruptcy Rule 8002(c).

A superficial review of the facts would seem to confirm that the notice of appeal in this case was untimely. The bankruptcy court entered its original order granting partial summary judgment on June 6, 1988 and its amended order on June 22, 1988. Pursuant to Bankruptcy Rule 8002(b), however, the ten-day period to appeal would not begin to run until the court entered its order denying appellants' timely motion for reconsideration on

December 2, 1988. At no time did appellants request the bankruptcy court for a twenty-day extension under Bankruptcy Rule 8002(c). Therefore, the ten-day period would have passed by December 16, 1988;[1] i.e. several months prior to the time the appeal was filed.

Appellants argue that the appeals period did not begin to run from the court's denial of their motion for reconsideration because the order and amended order granting partial summary judgment were interlocutory orders from which an appeal could not be taken until the termination of the case. The language of each order plainly states, however, "this Order shall be entered as judgment" as to the claims summarily adjudicated. The entry of such a judgment is all that is necessary under Bankruptcy Rule 8002(a) to commence the ten-day appeals period. *See* Bankruptcy Rule 8002(a).

Nevertheless, appellants claim that the requirements of as to Federal Rule of Civil Procedure 54(b) for entry of judgment fewer than all the claims in the case were not met. Rule 54(b) provides, in pertinent part, "the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." Fed. R. Civ. P. 54(b). Thus, the rule has four requirements: (1) multiple claims; (2) final adjudication of the claims as to which judgment is entered; (3) an express determination that there is no reason for delay; and (4) an express direction for the entry of judgment. *See* Fed. R. Civ. P. 54(b); *see also Continental Airlines v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1524-25 (9th Cir. 1987).

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[1] Fed. R. Civ. P. 6(a) provides that intermediate Saturdays and Sundays shall be excluded in computing periods of time less than 11 days.

Appellants correctly argue that the bankruptcy court did not properly make a finding that there was no just reason for delay. The orders, prepared for the court by counsel, do not include any discussion of the basis for the finding, but merely include the conclusory language "There is no just reason for delaying entry of this judgment as to those causes of action for which summary judgment is granted, and judgment shall so be entered." Although Rule 54(b) itself does not require that reasons be given for making the determination, all the circuit courts which have addressed the issue have held that the lower court has an obligation to explain its conclusion that there is "no just reason for delay" in entering final judgment. *See, e.g., Santa Maria v. Owens-Illinois, Inc.*, 808 F.2d 848, 854-55 (1st Cir. 1986); *Ansam Assoc., Inc. v. Cola Petroleum, Ltd.*, 760 F.2d 442, 445-46 (2d Cir. 1985); *Allis-Chalmers Corp. v. Philadelphia Electric Co.*, 521 F.2d 360, 364 (3d Cir. 1975); *Kirtland v. J. Ray McDermott & Co.*, 568 F.2d 1166, 1171 (5th Cir. 1978); *Knafel v. Pepsi Cola Bottlers of Akron, Inc.*, 850 F.2d 1155, 1159-60 (6th Cir. 1988); *U.S. General, Inc. v. Joliet*, 598 F.2d 1050, 1051 fn. 1 (7th Cir. 1979); *Hayden v. McDonald*, 719 F.2d 266, 268 (8th Cir. 1983). The Ninth Circuit has not ruled on this issue.

The reasons given for such a requirement are persuasive. Rule 54(b) provides an exception to the general rule against piecemeal disposal of litigation. *See Santa Maria v. Owens-Illinois, Inc.*, 808 F.2d at 854. A court "should grant Rule 54(b) certification only where there exists 'some danger of hardships or injustice through delay which would be alleviated by immediate appeal.' " *Ansam Assoc. v. Cola Petroleum, Ltd.*, 760 F.2d at 445 (citing *Campbell v. Westmoreland Farm Inc.*, 403 F.2d 939, 942 (2d Cir. 1968)).

As the First Circuit stated in *Santa Maria*, a "talismanic statement in the judgment that 'there is no just reason for delay in the entry of Final Judgment' is not sufficient to signal a deliberative and properly considered discretionary decision on whether, weighing all the competing concerns and interests" to permit an early and piecemeal appeal. *Santa Maria v. Owens-Illinois*, 808 F.2d at 854. In *Allis-Chalmers*, the Third Circuit observed:

> It is essential . . . that a reviewing court have some basis for distinguishing between well reasoned conclusions arrived at after a comprehensive consideration of all relevant factors, and mere boiler-plate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law.

Allis-Chalmers Corp. v. Philadelphia Electric Co., 521 F.2d at 364. Moreover, even where the lower court properly supports its certification, "Rule 54(b) should not be used routinely, but rather should be reserved for the 'infrequent harsh case' where certification serves the interests of justice and judicial administration." *Knafel v. Pepsi Cola Bottlers of Akron, Inc.*, 850 F.2d at 1159-60 (citations omitted). Such certification "should not be entered routinely or as a courtesy or accommodation to counsel." *Panichella v. Pennsylvania Railroad*, 252 F.2d 452, 455 (3d Cir. 1958).

Accordingly, since the bankruptcy court's June 6, 1988 order and June 22, 1988 amended order did not adequately set forth any reasoned explanation for entry of a final judgment as to the dismissed claims, or even alert the parties to the invocation of Rule 54(b), the order was not a sufficient Rule 54(b) certification. As a result, the 10-day appeals period did not begin to run until September 8, 1989 when the court entered its final judgment on the remaining claims after trial. Pursuant to Federal Rule of Appellate Procedure 4(a)(2), appellants' premature July 20, 1989 notice of appeal will be treated as if filed on the date final judgment was entered. For the same reasons, the bankruptcy court's denial of appellants' motion for reconsideration is also properly before this court on appeal.

B. The Sanctions on the Motion for Reconsideration

Appellants have appealed from both the letter dated April 18, 1989, which informed the parties that the court intended to grant appellees' request for sanctions, and the subsequent order which actually granted the sanctions. The letter is not a proper subject of appeal because it is not a "judgment, order, or decree" within the meaning of Bankruptcy Rule 8002(a).

Furthermore, appellants did not properly appeal the sanctions order because they did not obtain leave to bring such an appeal as required by 28 U.S.C. 158(a). An order granting sanctions is collateral and interlocutory. Title 28, U.S.C., section 158(a) provides that district courts have jurisdiction to hear appeals from interlocutory orders only when leave of court is obtained. *See* 28 U.S.C. § 158(a). Appellants have not obtained leave to file such an appeal, nor have they ever requested such leave. Accordingly, this court will not review the sanctions order on appeal.

C. Sanctions for the Appeal

Appellees request that sanctions be imposed on appellants for filing the instant appeal due to its lack of timeliness. Having found that the appeal was timely, this court will not grant appellees' request.

CONCLUSION

Appellees' motion to dismiss is hereby denied as to the appeals of the June 6, 1988 order granting partial summary judgment, the June 22, 1988 amended order, and the December 2, 1988 order denying the motion for reconsideration. The motion to dismiss is granted as to the April 18, 1989 letter and the July 11, 1989 order granting sanctions. Finally, the hearing on this motion set for February 5, 1989 at 10:30 a.m. is hereby vacated.

IT IS SO ORDERED.

Dated: FEB 2 1990 /s/ Gordon Thompson, Jr.
GORDON THOMPSON, JR.
United States District Judge

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JOHN R. LINDSAY, et al.

JUDGMENT IN A CIVIL CASE

V.

BENEFICIAL REINSURANCE COMPANY, et al.,

CASE NUMBER: 89-1270GT

(Filed Feb. 2, 1990)

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[XX] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED Appellees' motion to dimiss is hereby denied as to the appeals of June 6, 1988 order granting partial summary judgment, the June 22, 1988 amended order, and the December 2, 1988 order denying the motion for reconsideration. The motion to dimiss is granted as to the April 18, 1989 letter and the July 11, 1989 order granting sanctions. Finally, the hearing on this motion set for February 5, 1989 at 10:30 a.m. is hereby vacated. **IT IS SO ORDERED.**

February 2, 1990	William H. Luddy
Date	***Clerk***

(SEAL) Monique Chapple
(By) Deputy Clerk

In re John R. LINDSAY,
et al, Debtors.
John R. LINDSAY, et al., Plaintiffs,

v.

BENEFICIAL REINSURANCE
COMPANY, etc., et al.,
Defendants.

Adv. No. C86-0279-LM11.
Bankruptcy Nos. 86-00478-LM11,
85-03241-LM11, 86-04210-LM11
and 86-04209-LM11.

United States Bankruptcy Court,
S.D. California.

April 18, 1989.

Adversary proceeding was brought to set aside deed of trust foreclosure sale as alleged fraudulent conveyance. The Bankruptcy Court, Louise DeCarl Malugen, J., held that: (1) mortgage foreclosure sale is itself "transfer" separate and apart from perfection of mortgagee's lien, which may be set aside as fraudulent conveyance if other statutory requirements are met; (2) even a regularly conducted, noncollusive foreclosure sale may be set aside as "fraudulent conveyance," if mortgagee does not take commercially reasonable steps to achieve best price at sale; and (3) deed of trust foreclosure sale at which property was sold for 64% of its fair market value could be set aside as fraudulent conveyance.

So ordered.

Robert L. Rentto, San Diego, Cal., for plaintiffs.

Michael E. Busch, Page, Tucker, Brooks & Busch, San Diego, Cal., for defendants.

MEMORANDUM DECISION

LOUISE DeCARL MALUGEN,

Bankruptcy Judge.

Four related Chapter 11 debtors filed a complaint against Beneficial Reinsurance Company and a related company to set aside a foreclosure sale occurring in Texas in February 1986. The matter came on for trial on July 26, 1988, and continued thereafter on July 27, August 3, 4 and 9, 1988. After trial, the Court took the matter under submission to permit the parties to file supplemental briefs.

The principal theory on which the plaintiffs proceed is that the foreclosure sale should be avoided as a fraudulent conveyance under 11 U.S.C. § 548(a). As such, this is a core proceeding under 28 U.S.C. § 157(b)(2)(H). This Court has jurisdiction to hear the matter pursuant to 28 U.S.C. § 1334 and General Order No. 312-D of the U.S. District Court for the Southern District of California.

Having considered the testimony of the witnesses, examined the evidence offered by the respective parties, considered the written and oral arguments of counsel, including the supplemental briefs, and the case having been submitted to the Court for decision, the Court now makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The Court incorporates by reference the extensive admitted facts set forth in Paragraph III of the Pretrial

Order entered July 13, 1988, an excerpt of which is attached hereto as Exhibit "A".

2. The plaintiffs were the beneficiaries of a $2.1 million promissory note secured by a wrap-around deed of trust on property owned by Greenway Plaza Investment Company ("Greenway"). Beneficial Reinsurance Company ("Beneficial") was the beneficiary of a $1.4 million promissory note secured by a first deed of trust on the same property.

3. On March 25, 1985, Greenway filed a Chapter 11 petition in the United States Bankruptcy Court for the Northern District of Texas.

4. On or about January 8, 1986, Beneficial obtained relief from the stay to foreclose on the property. The plaintiffs had no notice of this order.

5. On or about January 10, 1986, Beneficial's trustee gave notice of a foreclosure sale to be held on February 4, 1986, to the plaintiffs at their last known address; namely, 3456 Camino del Rio North, Suite 101, San Diego, California 92108. The plaintiffs had moved from that business address and, at the time the notice was sent, maintained a business address of 9225 Mira Mesa Boulevard, Suite 208, San Diego, California.

The plaintiffs did not receive notice of the foreclosure sale.

6. At the foreclosure sale held in Austin, Texas, on February 4, 1986, Beneficial bid $1,592,047.51, which was less than the amount it was owed. Beneficial was the successful bidder at the sale.

7. In late 1985, the plaintiffs retained Mr. Harry Seidman, M.A.I., appraiser, to appraise the Greenway Plaza property in preparation for bringing the plaintiffs' own motion for relief from stay against Greenway. Mr. Seidman appraised the subject property as of January 3, 1986, one month before the foreclosure sale, at $2.5 million.

8. After commencement of this adversary action, Beneficial retained George Naeter, M.A.I., appraiser, to appraise the subject property. Mr. Naeter appraised Greenway Plaza as of January 28, 1987, at $1.7 million.

9. Both appraisers used three approaches to determining the estimated market value:

a. Using the cost approach, Seidman concluded that the indicated value of the property was $2,775,000. Naeter concluded that the indicated value was $1.7 million. Three main factors accounted for the large discrepancy between the values arrived at by taking this approach:

i. Seidman estimated the reproduction cost at approximately $500,000 more than Naeter.

ii. Naeter estimated incurable physical deterioration at approximately $500,000 more than Seidman.

iii. Naeter deducted $525,000 for "economic obsolesence" which he believed was needed to reflect Austin area vacancy levels of 20-25 percent, which were 15 percent above normal vacancy levels. No such adjustment was made by Seidman, whose appraisal was made before the severe decline in occupancy rates in the Austin market.

b. Using the income approach, Seidman concluded that the value of the subject property was $2,333,000; Naeter concluded it was $1,650,000. The principal reason for the disparity in value in using this approach appears to arise from the different methods used by the appraisers to analyze the value of the future income stream from this property. Using the conventional method, Seidman determined that market rent for this type of unit was $.44/sq. ft., projected the gross income for the property as stabilized, deducted for the estimated lease-up period and capitalized gross rents at 10 percent. Naeter used a discounted cash-flow analysis which he believes is more accurate in an unstable market where vacancy rates are increasing.

c. Using the direct or comparable sales approach, Seidman determined that the indicated value was $3 million; Naeter concluded that it was $1,735,000. The principal difference between the comparable sales analyses by the appraisers appears to be that Naeter did not use Seidman's comparable sales numbers 5, 6 and 7, which were in the same neighborhood as the subject property, although newer.

10. Both appraisers agree that apartment prices started to decline in late 1985 to early 1986. Seidman testified that, historically, the saturation point for apartment absorption in the Austin market was probably reached in the first quarter of 1986, but observed that no one recognized that fact during the first quarter of 1986. Both appraisers agreed that occupancy rates in the Austin rental market had declined since 1986, with the low point having been reached in the first quarter of 1987, about the time of the Naeter appraisal.

Having due regard to the excellent qualifications of both appraisers and the thoroughness of both appraisal reports, the Court gives the greatest weight to the Seidman appraisal as the more accurate reflection of market value at or about the time of the foreclosure. Much of the Naeter analysis appears to have been affected by the rapid decline in the Austin apartment market after the first quarter of 1986. In his income approach, Naeter used a discounted cash-flow analysis appropriate to an unstable market which was not the market condition on the foreclosure sale date. In his cost approach, he deducted for "economic obsolescence", which reflected vacancy levels occurring well after the sale date. These subjective adjustments demonstrate that Naeter was incurably influenced by the dramatic changes in the Austin market conditions which occurred sometime after the first quarter of 1986. The Naeter appraisal, coming almost one year after the foreclosure sale, simply cannot be accorded much weight as an analysis of the property's value on or about February 4, 1986.

11. After foreclosing upon the property, on February 26, 1986, Beneficial received an offer from Cambio Properties, Inc., to purchase the property for $1,850,000 (Exhibit 33). On March 7, 1986, Cambio increased its offer to $1,875,000, subject to inspection and financing contingencies (Exhibit 34). On March 12, 1986, Beneficial accepted the Cambio offer (Exhibit 55). After numerous extensions of time limits for removal of contingencies, on April 1, 1986, Cambio withdrew from the transaction (Exhibit 43).

12. On or about April 24, 1986, Beneficial received an offer for the Greenway Plaza from Century Pacific

Properties, Inc., for a price of $1,950,000 (Exhibit 56). On April 30, 1986, Beneficial made a counter-offer to the Century offer (Exhibit 57), which counter-offer was accepted by Century on May 1, 1986.

Peter Ulrich, who was the president of Beneficial during 1986, testified that he could not recall why the escrow failed.

13. As of the date of trial, Beneficial still retained ownership of the property.

14. After foreclosing on the property, Beneficial expended money to repair it. The sum of $150,000 was spent on roof repair; $200,000 has also been spent on other repairs.

15. Beneficial did not bid the full amount of its indebtedness at the foreclosure sale. Its bid was approximately $100,000-120,000 less than the full amount of the indebtedness, since it did not include all costs, interest and taxes.

DISCUSSION

This case presents a rather anomalous set of circumstances. California Chapter 11 debtors are challenging the adequacy of a Texas foreclosure by a senior trust deed holder, at which the property was sold for 64 percent of its fair market value. Had this foreclosure sale been challenged in a bankruptcy court in Texas, based on the facts as found by this Court, it is likely that it would have been set aside under the holding of *Durrett v. Washington National Ins. Co.*, 621 F.2d 201 (5th Cir.1980). *Durrett* and the later opinion of *Abramson v. Lakewood Bank & Trust*

Co., 647 F.2d 547 (5th Cir.1981), *cert. denied*, 454 U.S. 1164, 102 S.Ct. 1038, 71 L.Ed.2d 320 (1982), held that a lien enforcement sale (foreclosure sale or sheriff's sale) for less than reasonably equivalent value could be attacked as a fraudulent transfer under § 67(d) of the former Bankruptcy Act and its successor § 548(a) of the Bankruptcy Code. Most courts have interpreted *Durrett* as standing for the proposition that "reasonably equivalent value" in the lien or execution sale context is present if the sale achieves at least 70 percent of the fair market value and is otherwise non-collusive.

As observed, although this foreclosure sale took place in Texas, the attack on it is being waged in a California bankruptcy court, and the Court must test whether this transaction is avoidable under § 548(a) by the interpretation accorded that section by the Ninth Circuit.[1] This inquiry is made more difficult by what this Court perceives as a lack of clarity in the law of this circuit construing § 548(a).

In order to establish a fraudulent conveyance under § 548(a), the complainant must show that there was (1) a "transfer" of an interest of the debtor (2) within one year from the date of filing of the petition (3) for less than "reasonably equivalent value" and (4) the debtor was insolvent or became insolvent because of the transfer. Here, there is no claim that the debtors were solvent after the foreclosure sale and, indeed, since their ownership interests in the deed of trust were their principal assets, Beneficial could not seriously press this argument.

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[1] *Hasbrouck v. Texaco, Inc.*, 663 F.2d 930 (9th Cir.1981); *cert. denied*, 459 U.S. 828, 103 S.Ct. 63, 74 L.Ed.2d 65 (1982).

The answer to the more troublesome question of whether a foreclosure sale is a "transfer" within the meaning of § 548(a) has a varied history in this Circuit. Initially, this matter was addressed by the Bankruptcy Appellate Panel (BAP) in the decision of *Madrid v. Lawyers Title Ins. Corp. (In re Madrid),* 21 B.R. 424 (9th Cir. BAP 1982). In that decision, the panel side-stepped the question of whether the sale constituted the transfer (although it impliedly assumed the sale was a transfer), and instead focused upon the question of "reasonably equivalent value." Rejecting the *Durrett* analysis, the BAP held that " . . . the consideration received at a non-collusive and regularly conducted foreclosure sale" withstood avoidance as a fraudulent conveyance. *Madrid,* 21 B.R. at 427.

When appealed to the Ninth Circuit Court of Appeals, the court affirmed the BAP's decision on different grounds; namely, that the foreclosure sale was not the date of transfer at all. *In re Madrid,* 725 F.2d 1197 (9th Cir.1984). Rather, the court determined that the transfer for § 548(a) purposes occurred when the lender's security interest in the debtor's property was perfected and, since the deed of trust was recorded more than one year prior to the filing of the bankruptcy petition, the transfer was not subject to attack.

Unfortunately, this rationale overlooks the fact that when a security agreement is enforced (i.e., by a foreclosure), a second transfer occurs of the debtor's equity interest in the property over and above that which is necessary to satisfy the secured debt. It is this transfer, which usually occurs later than the security transfer and may be involuntary, that is being challenged as fraudulent.[2] Judge Farris' concurring opinion in Madrid recognized the flaw in the majority's reasoning that there is only one transfer, stating:

> As I understand the majority's rationale, such subsequent transfers would not be covered even if effected with actual intent to defraud. Section 548(d)(1), relied upon by the majority, does not support the "one transfer" rule. That section addresses the problem of secret transfers by refusing to recognize transfers that are not sufficiently open to be valid against bona fide purchasers. 725 F.2d at 1204.

When the BAFJA amendments were drafted in 1984, there was an attempt by Congress to resolve the *Madrid/Durrett* schism. In his excellent summary in the case of *In re Verna*, 58 B.R. 246 (Bankr.C.D.Cal.1986), Judge Bufford describes the changes that were proposed, the controversy generated by them, the amendments enacted and the attempts after enactment to "create" legislative history. *Id.* at 250-51. The legislative flurry resulting in the BAFJA amendments did make two critical changes to the Bankruptcy Code. First, § 101(40), which is now § 101(50), was amended to define a "transfer" as the "foreclosure of the debtor's equity of redemption."[3] The effect is to statutorily recognize that while the granting of a security interest may be one transfer, a second transfer occurs upon foreclosure of the debtor's equity interest. Second, § 548(a) was broadened to give a trustee the power to avoid a transfer if the debtor "voluntarily or involuntarily" made the transfer.

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[2] See Kennedy, *Involuntary Fraudulent Transfers*, 9 Cardozo L.Rev. 531, 554-49 (1987); Alden, Gross and Borowitz, *Real Property Foreclosure As A Fraudulent Conveyance: Proposals For Solving The Durrett Problem*, 38 Bus.Law. 1605, 1608-13 (1983).

[3] Section 101(50) now reads in its entirety: "Transfer" means every mode, direct or indirect, absolute or conditional,

Since the enactment of the BAFJA amendments, the Ninth Circuit Court of Appeals has not had an opportunity to address the effect of these amendments on post-BAFJA foreclosure sales.[4] The bankruptcy court in Verna, *supra,* was the first to do so in California. In addressing the question of whether a foreclosure sale constituted a transfer, Judge Bufford agreed with the holding in *In re Christian,* 48 B.R. 833 (D.Colo.1985), observing:

> The court found, under Colorado law, that the foreclosure sale only transferred a lien interest to the purchaser, which did not ripen into an ownership interest until after the redemption period expired. The court held that the change in rights arising from the foreclosure sale resulted in the transfer of an interest in the

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voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption. The phrase "and foreclosure of the debtor's equity of redemption" was added by BAFJA in 1984.

[4] In the recent decision of *In re Ehring,* 91 B.R. 897 (9th Cir. BAP 1988), the BAP obliquely addressed the state of Ninth Circuit law post- BAFJA in a case in which a foreclosure sale was attacked as a preference under § 547. Although they held that the foreclosure sale was not a preference, the Panel could not agree whether the Ninth Circuit Madrid rule had been changed by the BAFJA amendments.

> property. The *Christian* court is thus in agreement with this Court's analysis. 58 B.R. at 251.

This Court agrees with the Christian and Verna holdings that a foreclosure sale is a transfer for § 548(a) purposes. The amendment to § 101(50) now makes clear that a transfer occurs when the debtor loses its equity interest in a property. For § 548(d)(1) purposes, that occurs when the foreclosure is conducted. *Butler v. Lomas and Nettleton*, 862 F.2d 1015, 18 BCD 1039 (3d Cir.1988); *see also*, Alden, Gross & Borowitz, *supra* note 2, at 1610-11.

In addressing whether the debtor received reasonably equivalent value at the foreclosure, the *Verna* court was likewise unsure of the state of the Ninth Circuit law. Judge Bufford stated:

> In overruling the Ninth Circuit's *Madrid* decision, Congress did not reinstate the Ninth Circuit Bankruptcy Appellate Panel's *Madrid* decision, which held that a regularly conducted and noncollusive foreclosure sale establishes the reasonably equivalent value of the property. *Id.* at 251-52.

Nevertheless, he adopted the reasoning of the majority in the BAP *Madrid* decision, holding that:

> Where a third party purchases property at a non-collusive and regularly conducted foreclosure sale, the sale establishes the reasonably equivalent value as required by Bankruptcy Code Section 548. *Id.* at 252.

It is against this backdrop that this Court examines what rule should be applied in determining whether a foreclosure sale may be avoided as a fraudulent conveyance under § 548(a).

In reviewing the decisions of the progeny of *Durrett* and *Madrid,* it appears that some of the courts are engaging in policy debates over the purpose of Bankruptcy Code § 548. Those aligned with the BAP majority in *Madrid* seem to focus on the original intention of the law of fraudulent conveyances as reflected by the Statute of 13 Elizabeth enacted in 1570. That purpose was stated to be for "Avoiding and Abolishing . . . Conveyances . . . Judgments and Executions as well of Lands and Tenements as of Goods and Chattels, . . . devised and contrived . . . to the End and Purpose and Intent, to delay, hinder or defraud Creditors." 13 Eliz., chapt. 5, sec. I (1570) as quoted in Kennedy, *supra* note 2, at 536-7 (1987). When early fraudulent conveyance cases forced courts to wrestle with difficulty of proving a debtor's subjective intent to defraud, courts devised "badges of fraud" – circumstances or conduct from which a court might find constructive fraud without regard to intent. Despite the adoption of the concept of constructive fraud by American bankruptcy law and the predecessors to § 548(a),[5] these anti-Durrett courts agree with the conclusion that:

> Non-collusive, regularly conducted foreclosure sales, non-fraudulent by definition, were not within the "mischief" for which the statute was written, and thus, until *Durrett,* courts did not apply fraudulent conveyance law to these sales. Zinman, *NonCollusive, Regularly Conducted Foreclosure Sales: Involuntary NonFraudulent Transfers,* 9 Cardozo L.Rev. 581, 584 (1987).

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[5] Kennedy, *supra,* at 537, 553.

See, also, In re Bundles, 61 B.R. 929, 935 (Bankr.S.D.Ind.1986); *In re Winshall Settlor's Trust,* 758 F.2d 1136 (6th Cir.1985).

On the other hand, those courts which agree with *Durrett* have been troubled by state court foreclosure procedures which frequently result in the loss to other creditors of a substantial amount of debtor's equity.[6] They view § 548's purpose as ensuring a fair return on the debtor's assets for the benefit of all creditors:

> All of these arguments [in favor of a irrebuttable presumption for non-collusive foreclosure sales] have a common flaw: They assume that state foreclosure procedures are designed to attract bidders and bring the highest price possible under the circumstances for real property. Quite often the opposite is true. Most state real estate foreclosure laws require little in the way of advertising or other promotional efforts regardless of whether or not sales are judicially supervised. *In re General Ind.,* 79 B.R. 124, 131- 32 (Bankr.D.Mass.1987).

See, also, In re Pruitt, 72 B.R. 436, 446 (Bankr.E.D.N.Y.1987).

Implicitly, these courts recognize, as observed by Professor Frank Kennedy, that the injury to unsecured creditors, when the purchaser at a foreclosure sale pays an inadequate price, is no less than when the debtor participates in the fraud:

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[6] *See,* also Lo Pucki, *A General Theory of the Dynamics of the State Remedies/Bankruptcy System,* 1982 Wis.L.Rev. 311, 316-21; and, Wechsler, *Through The Looking Glass: Foreclosure By Sale As De Facto Strict Foreclosure – An Empirical Study of Mortgage Foreclosure And Subsequent Resale,* 70 Cornell L.Rev. 850, 870-1 (1985), for studies of the inefficiencies of state foreclosure procedures and comparison with bankruptcy court sales procedures.

> It is difficult to take seriously an argument that a foreclosure which sacrifices a valuable equity of an insolvent debtor's property should be voidable by creditors when debtor is compliant or cooperative, but that such a sale should be invulnerable to attack by creditors when the debtor either simply defaults or is resistant but unable to forestall the loss. The injury to creditors resulting from a forfeiture of an asset having significant value is equally palpable and ought to be equally remediable in any rational system without to the debtor's mental state. . . . Kennedy, *supra* note 2, at 576.

Although pondering the philosophical underpinnings of § 548 is an interesting intellectual exercise, this Court is constrained to observe that any analysis of the statute must begin with the clear language of that statute. Section 548(a) provides that a transfer of the debtor's property may be set aside if it is made for less than reasonably equivalent value. The provision makes no distinction between sales that do or do not comply with state law. Although it does appear that the exemption for noncollusive, regularly conducted foreclosure sales was an attempt to "harmonize" foreclosure law with fraudulent conveyance law, compliance with the state standard should not determine the outcome where Congress has established a federal standard which would permit avoidance as constructive fraud where an inadequate price was realized.[7]

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[7] We are also aware that courts rejecting application of a federal standard to regularly conducted foreclosure sales under

Judge Volinn, in his dissent to the BAP *Madrid* decision, concluded that no exemption should be extended to regularly conducted non-collusive foreclosure sales because:

> Section 548 transcends the dispute between this debtor and the secured creditor. It brings into focus the claims of the debtor's other creditors that they have been deprived of recourse to an asset by an improvident sale. The majority would hold that despite widespread differences in law and practices related to foreclosure, no bankruptcy court may entertain the factual issue of whether, under § 548, the consideration paid was the reasonably equivalent value. By concluding that a regularly conducted sale in the absence of collusion satisfies the "reasonably equivalent value" test, the majority has excised vital language from § 548 in order to create an

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§ 548(a)(2) did so out of grave concern over the economic effect of adopting an independent standard of review. [*see In re Madrid*, 725 F.2d 1197, 1202: "Negative repercussions would also be likely in the lending arena, where creditors would be less willing to lend funds on the security of a mortgage or deed of trust."; *Abramson v. Lakewood Bank & Trust Co.*, 647 F.2d 547, 550, Clark, J., dissenting: "The cloud created over mortgages and trust deeds by making foreclosure sales subject to being avoided by a bankruptcy trustee will naturally inhibit a purchaser other than a mortgagee from buying at foreclosure. This tends to depress further the prices of foreclosure sales. . . . "; *In re Verna*, 58 B.R. 246, 252: "A contrary rule would put a cloud on the title of any property subject to a foreclosure sale . . . Such a cloud would seriously impair the marketability of foreclosed property."]

However, at least one commentator suggests that these fears are not supported by hard statistical data. The conclusion of this commentator is that, " . . . the available aggregated

> exception to the statute where a forced sale of debtor's property is involved. There is nothing in the Code nor its legislative history to suggest that such an exception was intended. 21 B.R. at 428.

The Seventh Circuit Court of Appeals in *Bundles v. Baker* (*In re Bundles*), 856 F.2d 815 (7th Cir.1988) endorsed Judge Volinn's position, stating:

> Implying an irrebuttable presumption would be inconsistent with that language. Such a reading, in effect, creates an exception to the trustee's avoiding powers under § 548(a)(2)(A) – an

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statistical data on interest rates, loan-to-price ratios, and total loans created before and after these decisions show that *Durrett* and *Madrid* made little, if any, apparent difference either way in those variables." Shuchman, *Data on the Durrett Controversy,* 9 Cardozo L.Rev. 605, 616 (1987). Commenting on similar doomsday warnings expressed after the decision in *In re Ruebeck,* 55 B.R. 163 (Bankr.D.Mass.1985), which mandated, among other things, a pre- sale appraisal, public advertisement and notice to real estate brokers, two years after the decision, Judge Queenan in the *In re General Industries, Inc.,* case observed:

> We understand that the Ruebeck decision, rather than "chilling" real estate foreclosures and impairing titles, has merely necessitated the filing of an affidavit by the mortgagee setting forth what actions he has taken in compliance with *Ruebeck.* Upon the recording of such an affidavit, title examiners and title insurance companies make no exception in the title report or insurance coverage concerning the foreclosure. 79 B.R. 124, 133 (Bankr.D.Mass.1987).

Regardless of the merits of the concerns, we agree with those courts who believe that economic policy concerns are best resolved by Congress. *Hulm v. First Federal S & L Assn.,* 738 F.2d 323, 327 (8th Cir.1984), *cert. denied* 469 U.S. 990, 105 S.Ct. 398, 83 L.Ed.2d 331 (1984); *Bundles v. Baker,* 856 F.2d 815 (7th Cir.1988).

> exception not otherwise found in the statute – for property sold at a foreclosure sale [citations omitted]. . . . Moreover, an irrebuttable presumption has the effect of reading good faith into section 548(a)(2)(A); as long as the sale is conducted in good faith and in accordance with state law, the sale priced is conclusively presumed to be a reasonably equivalent value. This result is inconsistent with section 548(a)(2)'s purpose of permitting the trustee to avoid transfers as constructively fraudulent, irrespective of the parties' intent. [citations omitted] Finally, an irrebuttable presumption renders section 548(a)(2) merely duplicative of other Code provisions, such as section 548(a)(1) (permitting avoidance for actual intent to defraud) and section 544(b) (permitting avoidance where state law would allow it. . . . We therefore conclude that section 548(a)(2)(A) establishes a federal basis – independent of state law – for setting aside a foreclosure sale. *Id.* at 823.

While we realize that some courts have pointed to the fact that during the 1984 amendment process Congress had under consideration a provision which would have exempted regularly conducted, non-collusive foreclosure sales (See *Verna, supra,* at 50), this provision was not enacted. Nothing more can be or should be read into the clear statutory language where Congress has not acted.

In arriving at a federal definition of "reasonably equivalent value", this Court is struck with the elusiveness of the entire concept of value. *See Bundles, supra,* at 823, 824. Judge Queenan, in the *General Industries* case, attempted to solve the dilemma by instead adopting a standard of "commercial reasonableness":

> The value equivalent at foreclosure is too slippery a concept to be expressed only in terms of dollars, whether it be deemed fair market value or a percentage thereof. The determination of whether the price obtained at foreclosure represents the property's reasonably equivalent value must, of course, be made only after due consideration of how the price compares to the property's value as opined by the experts. But it is equally important that the Court give consideration to the nature and extent of the sales efforts in assessing overall commercial reasonableness. Only then should a decision be made on the question of reasonable equivalence, with both price and the sales efforts being factors in that decision. 79 B.R. at 124.

Judge Volinn, in his *Madrid* dissent, recommended that the price paid at a regularly conducted foreclosure sale should be given a strong presumption of adequacy since, "One cannot disregard the fact that a foreclosure sale is a forced sale. . . . " 21 B.R. at 428.

Most recently, the Seventh Circuit Court of Appeals in *Bundles,* adopted a hybrid test recommending that although it would be appropriate to extend a rebuttable presumption to the price obtained at the foreclosure sale, the bankruptcy court should examine the foreclosure transaction in its totality, " . . . to determine whether the procedures employed were calculated not only to secure for the mortgagee the value of its interest, but also to return to the debtor-mortgagor his equity in the property." *Bundles, supra,* at 824.

This Court concludes that the most balanced approach is one which will leave undisturbed the result of foreclosure sales that are procedurally proper, non-collusive and conducted in a commercially reasonable manner. To achieve that result, the court should conduct the following inquiry: First, the court should determine whether the foreclosure sale was properly conducted in accordance with state law and was non-collusive.

Second, the court should examine the totality of circumstances surrounding the sale to determine whether commercially reasonable steps were taken to achieve the best price at the foreclosure. If the Court is satisfied with the answer to the second inquiry, no further examination of the sale need be made. There is no question that situations may occur in which a low percentage of fair market value is achieved even after employing sales efforts which are commercially reasonable for a forced sale. However, in those circumstances, this Court would leave the sales undisturbed. On the other hand, if the Court finds that the foreclosing creditor failed to take commercially reasonable steps to achieve the best forced sale price, the Court may then look to evidence of the effect of that failure on the price achieved. This third inquiry will necessarily require a consideration of evidence of the property's value, including its fair market value as determined by experts, or other evidence (such as resales).

In utilizing this three-part inquiry, the Court is not elevating compliance with state court foreclosure standards above all other factors. Neither is the Court looking solely to percentage of fair market value achieved. Rather, the Court will examine the price obtained at a foreclosure sale only when we are persuaded that the foreclosing creditor failed to take commercially reasonable efforts to achieve the best price.

CONCLUSIONS OF LAW

In making the first inquiry in this case – that is, whether the foreclosure sale was regularly conducted and non-collusive – this Court concludes that the foreclosure sale complied with Texas law despite the fact that debtors did not receive notice. Texas Property Code § 51.002 required only that notice of sale be given 21 days before the date of sale by posting the notice on the courthouse door, filing a copy of the notice in the office of the county clerk and serving the written notice of sale by certified mail on the debtors at the address shown by the records of the holder of the debt.

In granting Beneficial's FRCP 41(b) motion for judgment on the issue of notice, this Court found that although the trustee under the deed of trust had the debtors' correct address, Texas law does not impute that knowledge to the debt holder, Beneficial.[8] Therefore, even though debtors in this case did not receive notice of the foreclosure sale, because it was mailed to their old address, notice was given in compliance with the Texas statute. As one Texas court has opined, "The general purpose of the statute is to provide only a minimum level of protection for the debtor, and it provides for only constructive notice of the foreclosure." *Krueger v. Swann*, 604 S.W.2d 454, 457 (Tex.Ct.App.1980).

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[8] *Dillard v. Broyles*, 633 S.W.2d 636 (Tex.Ct.App.1982); *cert. denied*, 463 U.S. 1208, 103 S.Ct. 3539, 77 L.Ed.2d 1389 (1983).

Additionally, in completing the first stage of inquiry, the Court concludes there was no evidence of collusion.

The second stage of the inquiry is whether Beneficial undertook any effort to insure realization of the best price at the foreclosure sale. The Court concludes it did not. There is no evidence that Beneficial made any effort to achieve the best price at the sale. For instance, Beneficial did not appraise the property, advertise it widely or encourage competitive bidding before the sale.

In the absence of any evidence of commercially reasonable sales efforts, the Court must now inquire whether there is any evidence that Beneficial's failure to undertake such efforts impacted the sale price obtained. First, we start with the $2.5 million fair market value suggested by the Seidman appraisal. The foreclosure sale to Beneficial was for $1,592,047, or roughly 64 percent of the estimated fair market value. Further, the testimony of Beneficial's own witness, suggests that a better price could have been obtained at the foreclosure sale. Mr. Ulrich testified to the effect that the so-called "bottom fishers" offered $1,875,000 and $1,950,000 for the property shortly after the foreclosure sale.

The Court is aware that there is some debate whether fair market value is likely to be achieved at a well-publicized properly run foreclosure sale.[9] However, where there is substantial disparity between the fair market value and the foreclosure price, independent evidence that a better price could have been obtained and failure to take any commercially reasonable steps to realize the best price, the Court must find the debtors did not receive a reasonably equivalent value at the sale.

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[9] See discussion in *In re General Industries, supra*, at 130-31.

Having determined that the foreclosure sale should be avoided as a fraudulent conveyance, the Court must now establish an appropriate remedy. When a foreclosure sale is avoided as a fraudulent conveyance, the court may either rescind the transaction entirely, requiring the debtor to repay the lender the full amount of its price in exchange for return of the property; or, require the purchaser to return the property to the debtor or its value in exchange for a lien in the amount of the purchase price. *In re General Industries*, 79 B.R. at 134-35. Alden, Gross & Borowitz, *supra* note 2, at 1618.

In this case, the court is not faced with the uncomfortable situation of having to fashion a remedy involving a third party purchaser, since Beneficial still retains ownership. However, it must be remembered that these debtors were themselves lenders to Greenway, and were the owners of only a $2.1 million promissory note secured by a wrap-around deed of trust on the property.

Restoration of these parties to their respective positions at the time of the foreclosure sale is simply not possible. As both appraisers testified, sometime after the foreclosure sale occurred, the Austin apartment market precipitously declined. Neither the debtors nor Beneficial contends that the market has now recovered. As between the debtors and Beneficial, the burden of that loss must be allocated to the wrongdoer, Beneficial. However, return of the property or its equivalent value to the debtors (which the debtors are urging) does not require return of an asset valued at $2.5 million. Rather, at best, plaintiffs are entitled to recovery of the value of their promissory note, with deductions for the full amount of the Beneficial claim on the date of the foreclosure sale.

Accordingly, this Court finds that the debtors are entitled to a judgment in the amount of the difference between the balance due on their $2.1 million promissory note secured by a deed of trust and the amount of Beneficial's debt at the time of the sale. Although Beneficial bid only $1,592,047 at the foreclosure sale, Mr. Ulrich testified that approximately $120,000 in costs, interest and taxes advanced pre-sale was not included in the bid. This Court will make an additional deduction from the judgment in favor of the debtors for the actual amount of Beneficial's debt on the date of foreclosure. Beneficial may establish this by declaration, which may be challenged by the debtors at a supplementary hearing, if the debtors disagree with the calculations.

The Court will make no adjustment for the cost of repairs or improvements made by Beneficial or property taxes paid post-sale, since Beneficial has retained the use of the property, collected its income and had its "enjoyment" since the foreclosure sale date.

This Memorandum Decision constitutes findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052. Counsel for the debtors is directed to prepare an order in conformance with this Memorandum Decision within ten (10) days from the date of entry hereof.

EXHIBIT "A"

Excerpt From Pretrial Order Entered July 13, 1988

The following facts are admitted and require no proof:

1. Plaintiff John R. Lindsay ("Lindsay") is, and at all relevant times was, an individual and resident of San Diego County, California.

2. Plaintiff Lindsay Enterprises, Inc. ("LEI") is, and at all relevant times was, a corporation organized and existing under the laws of the State of California, with its principal office in San Diego County.

3. Plaintiff IMA 79-6 is, and at all relevant times was, a limited partnership organized and existing under the laws of the State of California, with its principal office in San Diego County.

4. Plaintiff IMA 81-3 is, and at all relevant times was, a limited partnership organized and existing under the laws of the State of California, with its principal office in San Diego County. (IMA 81-3 and IMA 79-6 are referred to collectively as "the IMAS").

5. LEI did not have a recorded interest in title of ownership in the subject property.

6. Defendant Beneficial Reinsurance Company was a corporation organized and existing under the laws of the State of California with, Plaintiffs contend its principal office in Los Angeles County, [sic] which was merged into Beneficial Standard Life Insurance Company on or about December 31, 1985, and dissolved.

7. Defendant Beneficial Standard Life Insurance Company is, and at all relevant times was, a corporation organized and existing under the laws of the State of California, with its principal office in Los Angeles County. Beneficial Standard Life Insurance Company is the successor in Beneficial Reinsurance Company's interest in the property at issue.

8. Lindsay filed a voluntary Chapter 11 petition with this Court on January 29, 1986.

9. LEI filed a voluntary Chapter 11 petition with this Court on July 12, 1985.

10. IMA 79-6 and 81-3 filed voluntary Chapter 11 petitions with this Court on July 2, 1986.

11. On or about October 27, 1982, the IMA's owned real property in Austin, Texas, commonly identified herein as The Greenway Plaza Apartments, and more particularly described as:

> Tract B, First Resubdivision of Greenway Plaza Southeast, a subdivision in Travis County, Texas, according to the map or Plat of record in Volume 64, Page 83, Plat Records of Travis County, Texas.

Beneficial Reinsurance Company held a promissory note made by the IMA's in the principal amount of $1,400,000, which was secured by a first priority trust deed encumbering the Greenway Plaza Apartments, and which was guaranteed by Lindsay.

12. On or about October 29, 1982, the IMA's sold the Greenway Plaza Apartments to Greenway Plaza Investment Co., a Texas partnership, and took back as part of

the purchase price therefor, an all-inclusive promissory note in the principal amount of $2,100,000, which included said obligation to Beneficial and which was secured by al [sic] all-inclusive trust deed (referred to as the "wraparound note and trust deed"). Said wraparound note and trust deed were junior to but wrapped around and included the $1,400,000 promissory note and trust deed executed by the IMA's and payable to Beneficial Reinsurance Company, and which were subsequently assigned to Beneficial Standard Life Insurance Company. There were no other trust deeds on The Greenway Plaza Apartments.

13. On or about March 25, 1985, Greenway Plaza Investment Co., filed a voluntary petition under Chapter 11 of the Bankruptcy Code in the U.S. Bankruptcy Court for the Northern District of Texas.

14. Beneficial asserted a claim against said debtor in the approximate amount of $1,400,000, secured by said first trust deed. On or about May 7, 1985, Beneficial, through Jenkens & Gilchrist, its attorneys, filed a Motion to Modify Stay, to Appoint an Examiner and Opposition to Debtors Post-Petition Use of Cash Collateral for stay relief in said bankruptcy case.

15. Plaintiffs asserted a claim against said debtor in the amount of the difference between the approximate amount of $2,100,000, secured by the wraparound trust deed less Beneficial's claim. On or about June 6, 1985, plaintiffs, through the Decker, Hardt firm, its attorneys, sent a letter to Beneficial through Jenkens & Gilchrist, a true copy of which has been marked as Exhibit "9".

16. On or about June 11, 1985, Beneficial, through Jenkens & Gilchrist, sent a letter to plaintiffs through the Decker, Hardt firm, a true copy of which has been marked as Exhibit "10".

17. On or about July 15, 1985, Beneficial, through Jenkens & Gilchrist, gave notice of foreclosure on a different property than Greenway Plaza, for which property different IMA partnerships were junior lienholders to Beneficial. That notice was sent to those partnerships as follows: IMA 79-8, IMA 78-1, IMA 77-4, and IMA 76-2 c/o John R. Lindsay, 9225 Mira Mesa Blvd., Ste. 208, P.O. Box 261249, San Diego, California 92126, a true copy of which has been marked as Exhibit "11".

18. On or about July 15, 1985, said IMA's through the Decker, Hardt firm, filed their motion for relief from stay in said bankruptcy proceeding.

19. On or about January 8, 1986, an order granting Beneficial stay relief to foreclose on The Greenway Plaza Apartments was obtained by Beneficial, through Jenkens & Gilchrist, and entered in said Texas Bankruptcy Court. Neither Beneficial nor anyone else sent a copy of that order to plaintiffs or their attorneys.

20. On or about January 10, 1986, Beneficial, through Jenkens & Gilchrist, mailed copies of notice of a foreclosure sale of The Greenway Plaza Apartments to the IMA's. Said notice was sent by certified mail to the IMA's at 3456 Camino del Rio North, Suite 101, San Diego, California 92108, at least 21 days before the date of the sale.

21. On or about January 13, 1986, Beneficial, through Jenkens & Gilchrist, mailed copies of notice of said foreclosure sale to Lindsay.

22. On or about February 4, 1986, Beneficial, through Jenkens & Gilchrist, the substitute trustee under the deed of trust conducted a foreclosure sale of The Greenway Plaza Apartments, at which sale Beneficial was the successful bidder and purchased The Greenway Plaza Apartments for a credit bid of $1,592,047.51. Plaintiffs contend in their Third Cause of Action for declaratory relief that there was a defect in the sale in that they allege there was not proper or adequate notice of the sale and the sale was therefore invalid.

23. Plaintiffs filed their adversary complaint on April 18, 1986. This complaint was not served on defendants.

24. Plaintiffs filed an amended complaint on September 29, 1986. This complaint was served on defendants on September 29, 1986.

25. On or about February 11, 1986, plaintiffs, through the Decker, Hardt firm, sought to set aside said sale through an Emergency Motion to Set Aside Order Terminating Stay and Setting Aside Foreclosure Sale filed in the Texas Bankruptcy Court. Said court denied said motion because it found that it did not have jurisdiction over either the Greenway Plaza Apartments or the dispute between Beneficial and plaintiffs.

26. On or about February 1986, Beneficial took possession of The Greenway Plaza Apartments. Beneficial received various offers to buy said property. No sale

closed and Beneficial remains in possession of said property.

27. The Greenway Plaza Apartments were in a poor state of repair and maintenance when Beneficial took possession thereof.

28. All of the payments received by Beneficial were from The Greenway Plaza Investment Co.

29. The following subparagraphs a through j are verbatim recitation of findings from the Amended Order Granting In Part Defendants' Motion for Summary Adjudication of the issues and Judgment thereon entered June 22, 1988:

a. The stay in the LEI and Lindsay cases did not apply to the property;

b. The IMA's did not file their Chapter 11 cases until after the foreclosure sale in Texas;

c. The filing of a Disclosure Statement and a Consolidated Plan of Reorganization dated May 5, 1986, for Lindsay Enterprises, Inc., and the subsequent confirmation of that Plan did not occur until after the foreclosure sale;

d. Plaintiffs allege a contract by Beneficial not to conduct a foreclosure sale or not to take any action before giving notice to plaintiffs;

e. There was not contract for the alleged agreements between plaintiff's Texas counsel and defendants' Texas counsel. Defendants' Texas counsel was asked to send a courtesy copy of the Agreed Order entered in The Greenway Plaza Investment Company bankruptcy;

f. There was no contract to not take any other action;

g. There was no reasonable reliance on the alleged promises by defendants' Texas counsel in this case to send a courtesy copy of the Agreed Order entered in The Greenway Plaza Investment Company bankruptcy or on the other promises allegedly made by defendants' Texas counsel;

h. The file in The Greenway Plaza Investment Company were public records in the Bankruptcy Court for the Northern District of Texas. Under the Bankruptcy Rules, plaintiffs, by Munsch, could have requested special notice. There was no evidence that plaintiffs or Munsch did any of the foregoing. Any purported reliance by plaintiffs on the actions or promises of Beneficial or its agents was unreasonable;

i. There is no evidence of an intentional or negligent concealment by Beneficial from plaintiffs or their Texas counsel;

j. There was no reasonable reliance by plaintiffs or their Texas counsel on the allegedly concealed facts.

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re JOHN R. LINDSAY, et al., Debtors. Related Bankruptcy Case Nos. 86-00478-LM11; 85-03241-LM11; 86-04210-LM11; 86-04209-LM11;	No. C86-0279-LM11 JUDGMENT ON SECOND AND THIRD CLAIMS (Filed Aug. 29, 1989)
JOHN LINDSAY, et al., Plaintiffs, vs. BENEFICIAL REINSURANCE COMPANY, etc., et al., Defendants.	

This matter came on regularly for trial on July 26, July 27, August 3, 4 and 9, 1988 before the undersigned in

Department 2 of the above Court, fifth floor, U.S. Courthouse, 940 Front Street, San Diego, California. Plaintiffs appeared through Robert L. Rentto and Ronald N. Guy, their attorneys. Defendants appeared through Michael E. Busch and Jean M. Heinz of Page, Tucker, Brooks & Busch, their attorneys. On the pleadings and papers on file herein, the evidence adduced and argument presented and the Court's Memorandum Decision filed on April 18, 1989 which constitutes findings of facts and conclusions of law, and good cause appearing therefor;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is granted to plaintiffs on the second claim in the amount of $835,607.96, that amount being the difference between $2,500,000 and $1,664,392.04.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, based on the Court's granting of defendants' motion under F.R.C.P. Rule 41(b) at the end of plaintiffs' case in chief, the foreclosure sale challenged herein by plaintiffs was regularly conducted under Texas law and judgment is granted to defendants on the third claim.

Dated: 29 Aug 89

/s/ Louise Decarl Malugen
LOUISE DECARL
MALUGEN, Judge
United States Bankruptcy
Court

Submitted by:

ROBERT L. RENTTO
Professional Law Corporation

By /s/ Robert L. Rentto
Robert L. Rentto
Attorneys for Plaintiffs

Approved as to form:

PAGE, TUCKER, BROOKS
& BUSCH

By /s/ Michael E. Busch
Michael E. Busch
Attorneys for
Defendants

Interest on this Judgement from date of judgement shall be at the rate of 8.27 percent, computed daily to date of payment and compounded yearly. Sec. 302; Federal Court improvement Act of 1982

Lindsay v. Beneficial; C86-0279-LM11